107

COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE SECOND.

BY

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CONTENTS.

BOOK II.

Of the RIGHTS of THINGS.

CONTENTS.

CONTENTS.

CONTENTS.

APPEN-

CONTENTS.

APPENDIX.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

OF PROPERTY, IN GENERAL.

THE former book of these commentaries having treated at large of the *jura perſonarum*, or ſuch rights and duties as are annexed to the perſons of men, the objects of our inquiry in this ſecond book will be the *jura rerum*, or, thoſe rights which a man may acquire in and to ſuch external things as are unconnected with his perſon. Theſe are what the writers on natural law ſtile the rights of dominion, or property, concerning the nature and original of which I ſhall firſt premiſe a few obſervations, before I proceed to diſtribute and conſider it's ſeveral objects.

THERE is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

IN the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over "all the earth; and over the fish of the sea, and over the "fowl of the air, and over every living thing that moveth

"upon

"upon the earth [a]." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

THESE general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa* "*omnibus, veluti unum cunctis patrimonium esset* [b]." Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer [c]: or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he

[a] Gen. i. 28.
[b] Justin. l. 43. c. 1.
[c] Barbeyr. Puff. l. 4. c. 4.

quitted the uſe or occupation of it, another might ſeiſe it without injuſtice. Thus alſo a vine or other tree might be ſaid to be in common, as all men were equally entitled to it's produce; and yet any private individual might gain the ſole property of the fruit, which he had gathered for his own repaſt. A doctrine well illuſtrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own [d].

BUT when mankind increaſed in number, craft, and ambition, it became neceſſary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *uſe* only, but the very *ſubſtance* of the thing to be uſed. Otherwiſe innumerable tumults muſt have ariſen, and the good order of the world been continually broken and diſturbed, while a variety of perſons were ſtriving who ſhould get the firſt occupation of the ſame thing, or diſputing which of them had actually gained it. As human life alſo grew more and more refined, abundance of conveniences were deviſed to render it more eaſy, commodious, and agreeable; as, habitations for ſhelter and ſafety, and raiment for warmth and decency. But no man would be at the trouble to provide either, ſo long as he had only an uſufructuary property in them, which was to ceaſe the inſtant that he quitted poſſeſſion;—if, as ſoon as he walked out of his tent, or pulled off his garment, the next ſtranger who came by would have a right to inhabit the one, and to wear the other. In the caſe of habitations in particular, it was natural to obſerve, that even the brute creation, to whom every thing elſe was in common, maintained a kind of permanent property in their dwellings, eſpecially for the protection of their young; that the birds of the air had neſts, and the beaſts of the field had caverns, the invaſion of which they eſteemed a very flagrant injuſtice, and would ſacrifice their lives to preſerve them. Hence a property was ſoon eſtabliſhed in every man's houſe and home-ſtall; which ſeem to have been originally mere

[d] *Quemadmodum theatrum, cum commune ſit, recte tamen dici poteſt, ejus eſſe eum locum quem quiſque occuparit. De Fin. l.* 3. *c.* 20.

temporary

temporary huts or moveable cabins, ſuited to the deſign of providence for more ſpeedily peopling the earth, and ſuited to the wandering life of their owners, before any extenſive property in the ſoil or ground was eſtabliſhed. And there can be no doubt, but that moveables of every kind became ſooner appropriated than the permanent ſubſtantial ſoil: partly becauſe they were more ſuſceptible of a long occupancy, which might be continued for months together without any ſenſible interruption, and at length by uſage ripen into an eſtabliſhed right; but principally becauſe few of them could be fit for uſe, till improved and meliorated by the bodily labour of the occupant: which bodily labour, beſtowed upon any ſubject which before lay in common to all men, is univerſally allowed to give the faireſt and moſt reaſonable title to an excluſive property therein.

THE article of food was a more immediate call, and therefore a more early conſideration. Such, as were not contented with the ſpontaneous product of the earth, ſought for a more ſolid refreſhment in the fleſh of beaſts, which they obtained by hunting. But the frequent diſappointments, incident to that method of proviſion, induced them to gather together ſuch animals as were of a more tame and ſequacious nature; and to eſtabliſh a permanent property in their flocks and herds, in order to ſuſtain themſelves in a leſs precarious manner, partly by the milk of the dams, and partly by the fleſh of the young. The ſupport of theſe their cattle made the article of *water* alſo a very important point. And therefore the book of Geneſis (the moſt venerable monument of antiquity, conſidered merely with a view to hiſtory) will furniſh us with frequent inſtances of violent contentions concerning wells; the excluſive property of which appears to have been eſtabliſhed in the firſt digger or occupant, even in ſuch places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a ſojourner, aſſerting his right to a well in the county of Abimelech, and exacting an oath for his ſecurity, "becauſe he had digged that well [e]." And Iſaac,

[e] Gen. xxi. 30.

about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace [f].

ALL this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seise upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire [g]. We have also a striking example of the same kind in the history of Abraham and his nephew Lot [h]. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "let there be no strife, I pray "thee, between thee and me. Is not the whole land before "thee? Separate thyself, I pray thee, from me. If thou wilt "take the left hand, then I will go to the right; or if thou "depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and beheld all "the plain of Jordan, that it was well watered every where, "even as the garden of the Lord. Then Lot chose him all "the plain of Jordan, and journeyed east; and Abraham "dwelt in the land of Canaan."

f Gen. xxvi. 15. 18, &c.

g *Colunt discreti et diversi; ut fons, ut campus, ut nemus, placuit. De mor. Ger.* 16.

h Gen. c. xiii.

UPON

UPON the ſame principle was founded the right of migration, or ſending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practiſed as well by the Phoenicians and Greeks, as the Germans, Scythians, and other northern people. And, ſo long as it was confined to the ſtocking and cultivation of deſert uninhabited countries, it kept ſtrictly within the limits of the law of nature. But how far the ſeiſing on countries already peopled, and driving out or maſſacring the innocent and defenceleſs natives, merely becauſe they differed from their invaders in language, in religion, in cuſtoms, in government, or in colour; how far ſuch a conduct was conſonant to nature, to reaſon, or to chriſtianity, deſerved well to be conſidered by thoſe, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new ſpots to inhabit, without encroaching upon former occupants: and, by conſtantly occupying the ſame individual ſpot, the fruits of the earth were conſumed, and it's ſpontaneous produce deſtroyed, without any proviſion for a future ſupply or ſucceſſion. It therefore became neceſſary to purſue ſome regular method of providing a conſtant ſubſiſtence; and this neceſſity produced, or at leaſt promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and conſequence, introduced and eſtabliſhed the idea of a more permanent property in the ſoil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in ſufficient quantities, without the aſſiſtance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to ſeiſe upon and enjoy the product of his induſtry, art, and labour? Had not therefore a ſeparate property in lands, as well as moveables, been veſted in ſome individuals, the world muſt have continued a foreſt, and men have been mere animals of prey; which, according to ſome philoſophers, is the genuine ſtate of na-

ture. Whereas now (fo gracioufly has Providence interwoven our duty and our happinefs together) the refult of this very neceffity has been the ennobling of the human fpecies, by giving it opportunities of improving it's *rational* faculties, as well as of exerting it's *natural*. Neceffity begat property: and, in order to infure that property, recourfe was had to civil fociety, which brought along with it a long train of infeparable concomitants; ftates, government, laws, punifhments, and the public exercife of religious duties. Thus connected together, it was found that a part only of fociety was fufficient to provide, by their manual labour, for the neceffary fubfiftence of all; and leifure was given to others to cultivate the human mind, to invent ufeful arts, and to lay the foundations of fcience.

THE only queftion remaining is, how this property became actually vefted: or what it is that gave a man an exclufive right to retain in a permanent manner that fpecific land, which before belonged generally to every body, but particularly to nobody. And, as we before obferved that occupancy gave the right to the temporary *ufe* of the foil, fo it is agreed upon all hands that occupancy gave alfo the original right to the permanent property in the *fubftance* of the earth itfelf; which excludes every one elfe but the owner from the ufe of it. There is indeed fome difference among the writers on natural law, concerning the reafon why occupancy fhould convey this right, and inveft one with this abfolute property: Grotius and Puffendorf infifting, that this right of occupancy is founded on a tacit and implied affent of all mankind, that the firft occupant fhould become the owner; and Barbeyrac, Titius, Mr Locke, and others, holding, that there is no fuch implied affent, neither is it neceffary that there fhould be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural juftice, without any confent or compact, fufficient of itfelf to gain a title. A difpute that favours too much of nice and fcholaftic refinement! However, both fides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man feifing to his own continued

ufe

use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

PROPERTY, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seise it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove[i].

BUT this method, of one man's abandoning his property, and another seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which

i See Vol. I. pag. 295.

may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius being the only or first man acquainted with such my intention, immediately steps in and seises the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention, ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition

at all, the municipal law of the country then ſteps in, and declares who ſhall be the ſucceſſor, repreſentative, or heir, of the deceaſed; that is, who alone ſhall have a right to enter upon this vacant poſſeſſion, in order to avoid that confuſion, which it's becoming again common would occaſion [k]. And farther, in caſe no teſtament be permitted by the law, or none be made, and no heir can be found ſo qualified as the law requires, ſtill, to prevent the robuſt title of occupancy from again taking place, the doctrine of eſcheats is adopted in almoſt every country; whereby the ſovereign of the ſtate, and thoſe who claim under his authority, are the ultimate heirs, and ſucceed to thoſe inheritances, to which no other title can be formed.

THE right of inheritance, or deſcent to the children and relations of the deceaſed, ſeems to have been allowed much earlier than the right of deviſing by teſtament. We are apt to conceive at firſt view that it has nature on it's ſide; yet we often miſtake for nature what we find eſtabliſhed by long and inveterate cuſtom. It is certainly a wiſe and effectual, but clearly a political, eſtabliſhment; ſince the permanent right of property, veſted in the anceſtor himſelf, was no *natural*, but merely a *civil*, right. It is true, that the tranſmiſſion of one's poſſeſſions to poſterity has an evident tendency to make a man a good citizen and a uſeful member of ſociety: it ſets the paſſions on the ſide of duty, and prompts a man to deſerve well of the public, when he is ſure that the reward of his ſervices will not die with himſelf, but be tranſmitted to thoſe with whom he is connected by the deareſt and moſt tender affections. Yet, reaſonable as this foundation of the right of inheritance may ſeem, it is probable that it's immediate original aroſe not from ſpeculations altogether ſo delicate and refined, and, if not from fortuitous circumſtances, at leaſt from a plainer and more ſimple principle. A man's children or neareſt relations are uſually about him on his

[k] It is principally to prevent any vacancy of poſſeſſion, that the civil law conſiders father and ſon as one perſon; ſo that upon the death of either, the inheritance does not ſo properly deſcend, as continue, in the hands of the ſurvivor. *Ff.* 28. 2. 11.

death-

death-bed, and are the earlieſt witneſſes of his deceaſe. They became therefore generally the next immediate occupants, till at length in proceſs of time this frequent uſage ripened into general law. And therefore alſo in the earlieſt ages, on failure of children, a man's ſervants born under his roof were allowed to be his heirs; being immediately on the ſpot when he died. For we find the old patriarch Abraham expreſsly declaring, that "ſince God had given him no ſeed, his ſteward Eliezer, one born in his houſe, was his heir[1]."

WHILE property continued only for life, teſtaments were uſeleſs and unknown; and, when it became inheritable, the inheritance was long indefeaſible, and the children or heirs at law were incapable of excluſion by will. Till at length it was found, that ſo ſtrict a rule of inheritance made heirs diſobedient and head-ſtrong, defrauded creditors of their juſt debts, and prevented many provident fathers from dividing or charging their eſtates as the exigence of their families required. This introduced pretty generally the right of diſpoſing of one's property, or a part of it, by *teſtament*; that is, by written or oral inſtructions properly *witneſſed* and authenticated, according to the *pleaſure* of the deceaſed; which we therefore emphatically ſtile his *will*. This was eſtabliſhed in ſome countries much later than in others. With us in England, till modern times, a man could only diſpoſe of one third of his moveables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only for a certain portion: for it was not till after the reſtoration that the power of deviſing real property became ſo univerſal as at preſent.

WILLS therefore and teſtaments, rights of inheritance and ſucceſſions, are all of them creatures of the civil or municipal laws, and accordingly are in all reſpects regulated by them; every diſtinct country having different ceremonies and requiſites to make a teſtament completely valid: neither does any thing vary more than the right of inheritance under different

[1] Gen. xv. 3.

national

national eſtabliſhments. In England particularly, this diverſity is carried to ſuch a length, as if it had been meant to point out the power of the laws in regulating the ſucceſſion to property, and how futile every claim muſt be, that has not it's foundation in the poſitive rules of the ſtate. In perſonal eſtates the father may ſucceed to his children; in landed property he never can be their immediate heir, by any the remoteſt poſſibility: in general only the eldeſt ſon, in ſome places only the youngeſt, in others all the ſons together, have a right to ſucceed to the inheritance: in real eſtates males are preferred to females, and the eldeſt male will uſually exclude the reſt; in the diviſion of perſonal eſtates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

THIS one conſideration may help to remove the ſcruples of many well-meaning perſons, who ſet up a miſtaken conſcience in oppoſition to the rules of law. If a man diſinherits his ſon, by a will duly executed, and leaves his eſtate to a ſtranger, there are many who conſider this proceeding as contrary to natural juſtice: while others ſo ſcrupulouſly adhere to the ſuppoſed intention of the dead, that if a will of lands be atteſted by only *two* witneſſes inſtead of *three*, which the law requires, they are apt to imagine that the heir is bound in conſcience to relinquiſh his title to the deviſee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the ſon had by nature a right to ſucceed to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the ſucceſſion of his property after his own deceaſe. Whereas the law of nature ſuggeſts, that on the death of the poſſeſſor the eſtate ſhould again become common, and be open to the next occupant, unleſs otherwiſe ordered for the ſake of civil peace by the poſitive law of ſociety. The poſitive law of ſociety, which is with us the municipal law of England, directs it to veſt in ſuch perſon as the laſt proprietor ſhall by will, attended with certain requiſites, appoint; and, in defect of ſuch appointment, to go to ſome particular perſon, who from the reſult

of certain local conſtitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a ſhadow of right in any one but the perſon appointed: and, where the neceſſary requiſites are omitted, the right of the heir is equally ſtrong and built upon as ſolid a foundation, as the right of the deviſee would have been, ſuppoſing ſuch requiſites were obſerved.

BUT, after all, there are ſome few things, which, notwithſtanding the general introduction and continuance of property, muſt ſtill unavoidably remain in common; being ſuch wherein nothing but an uſufructuary property is capable of being had: and therefore they ſtill belong to the firſt occupant, during the time he holds poſſeſſion of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: ſuch alſo are the generality of thoſe animals which are ſaid to be *ferae naturae*, or of a wild and untameable diſpoſition: which any man may ſeiſe upon and keep for his own uſe or pleaſure. All theſe things, ſo long as they remain in poſſeſſion, every man has a right to enjoy without diſturbance; but if once they eſcape from his cuſtody, or he voluntarily abandons the uſe of them, they return to the common ſtock, and any man elſe has an equal right to ſeiſe and enjoy them afterwards.

AGAIN; there are other things, in which a permanent property *may* ſubſiſt, not only as to the temporary uſe, but alſo the ſolid ſubſtance; and which yet would be frequently found without a proprietor, had not the wiſdom of the law provided a remedy to obviate this inconvenience. Such are foreſts and other waſte grounds, which were omitted to be appropriated in the general diſtribution of lands: ſuch alſo are wrecks, eſtrays, and that ſpecies of wild animals which the arbitrary conſtitutions of poſitive law have diſtinguiſhed from the reſt by the well-known appellation of game. With regard to theſe and ſome others, as diſturbances and quarrels would

would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissention, by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorised by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

CHAPTER THE SECOND.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real*, and things *personal*. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

IN treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

FIRST, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in it's vulgar accept-

ation

tation is only applied to houses and other buildings, yet in it's original, proper, and legal, sense it signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like[a]: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements[b]. But an *hereditament*, says sir Edward Coke[c], is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable: yet, being inheritable, is comprized under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament[d].

HEREDITAMENTS then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

CORPOREAL hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says sir Edward Coke[e], comprehendeth in it's legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath.

[a] Co. Litt. 6.
[b] *Ibid.* 19, 20.
[c] 1 Inst. 6.
[d] 3 Rep. 2.
[e] 1 Inst. 4.

It legally includeth alſo all caſtles, houſes, and other buildings: for they conſiſt, ſaith he, of two things; *land*, which is the foundation, and *ſtructure* thereupon: ſo that, if I convey the land or ground, the ſtructure or building paſſeth therewith. It is obſervable that *water* is here mentioned as a ſpecies of land, which may ſeem a kind of ſolecism; but ſuch is the language of the law: and therefore I cannot bring an action to recover poſſeſſion of a pool or other piece of water, by the name of *water* only; either by calculating it's capacity, as, for ſo many cubical yards; or, by ſuperficial meaſure, for twenty acres of water; or by general deſcription, as for a pond, a watercourſe, or a rivulet: but I muſt bring my action for that the land lies at the bottom, and muſt call it twenty acres of *land covered with water* [f]. For water is a moveable wandering thing, and muſt of neceſſity continue common by the law of nature; ſo that I can only have a temporary, tranſient, uſufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain ſubſtantial property; of which the law will take notice, and not of the other.

LAND hath alſo, in it's legal ſignification, an indefinite extent, upwards as well as downwards. *Cujus eſt ſolum, ejus eſt uſque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line, between the ſurface of any land and the center of the earth, belongs to the owner of the ſurface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other foſſils, his woods, his waters, and his houſes, as well as his fields and meadows. Not but the particular names of the things are

[f] Brownl. 142.

equally ſufficient to paſs them, except in the inſtance of water; by a grant of which, nothing paſſes but a right of fiſhing [g]: but the capital diſtinction is this; that by the name of a caſtle, meſſuage, toft, croft, or the like, nothing elſe will paſs, except what falls with the utmoſt propriety under the term made uſe of; but by the name of land, which is *nomen generaliſſimum*, every thing terreſtrial will paſs [h].

[g] Co. Litt. 4.

[h] *Ibid.* 4, 5, 6.

CHAPTER THE THIRD.

OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right iſſuing out of a thing corporate (whether real or perſonal) or concerning, or annexed to, or exerciſible within, the ſame [a]. It is not the thing corporate itſelf, which may conſiſt in lands, houſes, jewels, or the like; but ſomething collateral thereto, as a rent iſſuing out of thoſe lands or houſes, or an office relating to thoſe jewels. In ſhort, as the logicians ſpeak, corporeal hereditaments are the ſubſtance, which may be always ſeen, always handled: incorporeal hereditaments are but a ſort of accidents, which inhere in and are ſupported by that ſubſtance; and may belong, or not belong to it, without any viſible alteration therein. Their exiſtence is merely in idea and abſtracted contemplation; though their effects and profits may be frequently objects of our bodily ſenſes. And indeed, if we would fix a clear notion of an incorporeal hereditament, we muſt be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for inſtance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtleſs of a corporeal nature, yet the annuity itſelf, which produces that money, is a thing inviſible, has only a mental exiſtence, and cannot be delivered over from hand to hand. So tithes, if we conſider the pro-

[a] Co. Litt. 19, 20.

duce of them, as the tenth ſheaf or tenth lamb, ſeem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent ſpringing right, collateral to or iſſuing out of lands, can never be the object of ſenſe: that caſual ſhare of the annual increaſe is not, till ſevered, capable of being ſhewn to the eye, nor of being delivered into bodily poſſeſſion.

INCORPOREAL hereditaments are principally of ten ſorts; advowſons, tithes, commons, ways, offices, dignities, franchiſes, corodies or penſions, annuities, and rents.

I. ADVOWSON is the right of preſentation to a church, or eccleſiaſtical benefice. Advowſon, *advocatio*, ſignifies *in clientelam recipere*, the taking into protection; and therefore is ſynonymous with patronage, *patronatus*: and he who has the right of advowſon is called the patron of the church. For, when lords of manors firſt built churches on their own demeſnes, and appointed the tithes of thoſe manors to be paid to the officiating miniſters, which before were given to the clergy in common, (from whence, as was formerly mentioned [b], aroſe the diviſion of pariſhes,) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating ſuch miniſter as he pleaſed (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron [c].

THIS inſtance of an advowſon will completely illuſtrate the nature of an incorporeal hereditament. It is not itſelf the bodily poſſeſſion of the church and it's appendages; but it is a right to give ſome other man a title to ſuch bodily poſſeſſion. The advowſon is the object of neither the ſight, nor the touch; and yet it perpetually exiſts in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any viſible bodily transfer, nor can corporal poſſeſſion be

b Vol. I. pag. 112.

c This original of the *jus patronatus*, by building and endowing the church, appears alſo to have been allowed in the Roman empire. *Nov.* 26. *t.* 12. *c.* 2. *Nov.* 118. *c.* 23.

had of it. If the patron takes corporal poſſeſſion of the church, the church-yard, the glebe or the like, he intrudes on another man's property; for to theſe the parſon has an excluſive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of inviſible mental transfer: and being ſo veſted, it lies dormant and unnoticed, till occaſion calls it forth: when it produces a viſible, corporeal fruit, by entitling ſome clerk, whom the patron ſhall pleaſe to nominate, to enter and receive bodily poſſeſſion of the lands and tenements of the church.

ADVOWSONS are either advowſons *appendant*, or advowſons *in groſs*. Lords of manors being originally the only founders, and of courſe the only patrons, of churches [d], the right of patronage or preſentation, ſo long as it continues annexed to the poſſeſſion of the manor, as ſome have done from the foundation of the church to this day, is called an advowſon appendant [e]: and it will paſs, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words [f]. But where the property of the advowſon has been once ſeparated from the property of the manor by legal conveyance, it is called an advowſon in groſs, or at large, and never can be appendant any more; but is for the future annexed to the perſon of it's owner, and not to his manor or lands [g].

ADVOWSONS are alſo either *preſentative*, *collative*, or *donative* [h]. An advowſon preſentative is where the patron hath a right of preſentation to the biſhop or ordinary, and moreover to demand of him to inſtitute his clerk, if he finds him canonically qualified: and this is the moſt uſual advowſon. An advowſon collative is where the biſhop and patron are one and the ſame perſon: in which caſe the biſhop cannot preſent to himſelf; but he does, by the one act of collation, or con-

d Co. Litt. 119.

e *Ibid.* 121.

f *Ibid.* 307.

g *Ibid.* 120.

h *Ibid.*

ferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction [i]. This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of arch-bishop Becket in the reign of Henry II [k]. And therefore though pope Alexander III [l], in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the third, recorded by Matthew Paris [m], which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

HOWEVER this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the ad-

i Co. Litt. 344.
k Seld. tith. c. 12. §. 2.
l *Decretal. l.* 3. *t.* 7. *c.* 3.
m *A. D.* 1239.

vowson is now become for ever presentative, and shall never be donative any more [n]. For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings.

II. A SECOND species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops, and wood [o]; the second *mixed*, as of wool, milk, pigs, *&c.* [p], consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due [q].

IT is not to be expected from the nature of these general commentaries, that I should particularly specify, what things are titheable, and what not, the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, *&c.* whose increase, so as to profit the owner, is not annual, but casual [r]. It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom that

n Co. Litt. 344. Cro. Jac. 63.
o 1 Roll. Abr. 635. 2 Inst. 649.
p *Ibid.*
q 1 Roll. Abr. 656.
r 2 Inst. 651.

that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

1. As to their original, I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniencies, and moderate enjoyments of life, at their expence, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowleged and unsupported by temporal sanctions.

WE cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held *A. D.* 786[a], wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia

[a] Selden, c. 8. §. 2.

and

and Northumberland, the biſhops, dukes, ſenators, and people. Which was a few years later than the time that Charlemagne eſtabliſhed the payment of them in France [t], and made that famous diviſion of them into four parts; one to maintain the edifice of the church, the ſecond to ſupport the poor, the third the biſhop, and the fourth the parochial clergy [u].

THE next authentic mention of them is in the *foedus Edwardi et Guthruni;* or the laws agreed upon between king Guthrun the Dane, and Alfred and his ſon Edward the elder, ſucceſſive kings of England, about the year 900. This was a kind of treaty between thoſe monarchs, which may be found at large in the Anglo-Saxon laws [w]: wherein it was neceſſary, as Guthrun was a pagan, to provide for the ſubſiſtence of the chriſtian clergy under his dominion; and, accordingly, we find [x] the payment of tithes not only *enjoined*, but a *penalty* added upon non-obſervance: which law is ſeconded by the laws of Athelſtan [y], about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. WE are next to conſider the perſons to whom they are due. And upon their firſt introduction (as hath formerly been obſerved [z]) though every man was obliged to pay tithes in general, yet he might give them to what prieſts he pleaſed [a]; which were called *arbitrary* conſecrations of tithes: or he might pay them into the hands of the biſhop, who diſtributed among his dioceſan clergy the revenues of the church, which were then in common [b]. But, when dioceſes were divided into pariſhes, the tithes of each pariſh were allotted to it's own particular miniſter; firſt by common conſent, or the appointments of lords of manors, and afterwards by the written law of the land [c].

t *A. D.* 778.

u Book I. ch. 11. Seld. c. 6. §. 7. Sp. of laws, b. 31. c. 12.

w Wilkins, pag. 51.

x *cap.* 6.

y *cap.* 1.

z Book I. Introd. §. 4.

a 2 Inſt. 646. Hob. 296.

b Seld. c. 9. §. 4.

c *LL. Edgar. c.* 1 & 2. *Canut. c.* 11.

HOWEVER, arbitrary confecrations of tithes took place again afterwards, and became in general ufe till the time of king John [d]. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under arch-bifhop Dunftan and his fucceffors; who endeavoured to wean the people from paying their dues to the fecular or parochial clergy, (a much more valuable fet of men than themfelves,) and were then in hopes to have drawn, by fanctimonious pretences to extraordinary purity of life, all ecclefiaftical profits to the coffers of their own focieties. And this will naturally enough account for the number and riches of the monafteries and religious houfes, which were founded in thofe days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes fomewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to fome abbey already erected: fince, for this dotation, which really coft the patron little or nothing, he might, according to the fuperftition of the times, have maffes for ever fung for his foul. But, in procefs of years, the income of the poor laborious parifh priefts being fcandaloufly reduced by thefe arbitrary confecrations of tithes, it was remedied by pope Innocent the third [e] about the year 1200 in a decretal epiftle, fent to the archbifhop of Canterbury, and dated from the palace of Lateran: which has occafioned fir Henry Hobart and others to miftake it for a decree of the council of Lateran held *A. D.* 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen [f], whereas this letter of pope Innocent to the arch-bifhop enjoined the payment of tithes to the parfons of the refpective parifhes where every man inhabited, agreeable to what was afterwards directed by the fame pope in other countries [g]. This epiftle, fays fir Edward Coke [h], bound not the lay fubjects of this realm; but, being reafonable and juft, (and, he might have

d Selden, c. 11.

e *Opera Innocent. III. tom.* 2. *pag.* 452.

f *Decretal. l.* 3. *t.* 30. *c.* 19.

g *Ibid. c.* 26.

h 2 Inft. 641.

added,

added, being correſpondent to the antient law) it was allowed of, and ſo became *lex terrae*. This put an effectual ſtop to all the arbitrary conſecrations of tithes; except ſome footſteps which ſtill continue in thoſe portions of tithes, which the parſon of one pariſh hath, though rarely, a right to claim in another: for it is now univerſally held [i], that tithes are due, of common right, to the parſon of the pariſh, unleſs there be a ſpecial exemption. This parſon of the pariſh, we have formerly ſeen [k], may be either the actual incumbent, or elſe the appropriator of the benefice: appropriations being a method of endowing monaſteries, which ſeems to have been deviſed by the regular clergy, by way of ſubſtitution to arbitrary conſecrations of tithes [l].

3. WE obſerved that tithes are due to the parſon of common right, unleſs by ſpecial exemption; let us therefore ſee, thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or diſcharged from the payment of tithes, either in part or totally, firſt, by a real compoſition; or, ſecondly, by cuſtom or preſcription.

FIRST, a real compoſition is when an agreement is made between the owner of the lands, and the parſon or vicar, with the conſent of the ordinary and the patron, that ſuch lands ſhall for the future be diſcharged from payment of tithes, by reaſon of ſome land or other real recompenſe given to the parſon, in lieu and ſatisfaction thereof [m]. This was permitted by law, becauſe it was ſuppoſed that the clergy would be no loſers by ſuch compoſition; ſince the conſent of the ordinary, whoſe duty it is to take care of the church in general, and of the patron, whoſe intereſt it is to protect that particular church, were both made neceſſary to render the compoſition effectual: and hence have ariſen all ſuch compoſitions as exiſt at this day by force of the common law. But, experience ſhewing that even this caution was ineffectual, and

i Regiſt. 46. Hob. 296.

k Book I. pag. 385.

l In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 113. 284.

m 2 Inſt. 490. Regiſt. 38. 13 Rep. 40.

the

the poſſeſſions of the church being, by this and other means, every day diminiſhed, the diſabling ſtatute 13 Eliz. c. 10. was made: which prevents, among other ſpiritual perſons, all parſons and vicars from making any conveyances of the eſtates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this ſtatute, no real compoſition made ſince the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by conſent of the patron and ordinary: which has indeed effectually demoliſhed this kind of traffic; ſuch compoſitions being now rarely heard of, unleſs by authority of parliament.

SECONDLY, a diſcharge by cuſtom or preſcription, is where time out of mind ſuch perſons or ſuch lands have been, either partially or totally, diſcharged from the payment of tithes. And this immemorial uſage is binding upon all parties; as it is in it's nature an evidence of univerſal conſent and acquieſcence, and with reaſon ſuppoſes a real compoſition to have been formerly made. This cuſtom or preſcription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the ſimple name of a *modus* only, is where there is by cuſtom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increaſe. This is ſometimes a pecuniary compenſation, as twopence an acre for the tithe of land: ſometimes it is a compenſation in work and labour, as that the parſon ſhall have only the twelfth cock of hay, and not the tenth, in conſideration of the owner's making it for him: ſometimes, in lieu of a large quantity of crude or imperfect tithe, the parſon ſhall have a leſs quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in ſhort, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or ſpecial manner of tithing.

To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable*[n], for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from it's first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the *parson*, and not for the emolument of *third persons* only[o]: thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for[p]: one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parson would *bona fide* make a composition to receive less than his due in the same species of tithe: and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another[q]. Thus a *modus* of 1*d*. for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one, shall never be a discharge for the other. 5. The recompense must be in it's nature as durable as the tithes discharged by it; that is, an inheritance certain[r]: and therefore a *modus* that every *inhabitant* of a house shall pay 4*d*. a year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The *modus* must not be too large, which is called a *rank modus*: as if the real value of the tithes be 60*l*. *per annum*, and a *modus* is suggested of 40*l*. this *modus* will not be established; though one of 40*s*. might have been valid[s]. Indeed, properly speaking, the doctrine of *rankness* in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law[t].

[n] 1 Keb. 602.
[o] 1 Roll. Abr. 649.
[p] 1 Lev. 179.
[q] Cro. Eliz. 446. Salk. 657.
[r] 2 P. Wms. 462.
[s] 11 Mod. 60.
[t] *Pyke* v. *Dowling*. Hil. 19 Geo. III. C. B.

For,

For, in these cases of prescriptive or customary *modus's*, it is supposed that an original real composition was antiently made; which being lost by length of time, the immemorial usage is admitted as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the first [t]; and any custom may be destroyed by evidence of it's non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this *modus* is (in point of evidence) *felo de se* and destroys itself. For, as it would be destroyed by any direct evidence to prove it's non-existence at any time since that aera, so also it is destroyed by carrying in itself this internal evidence of a much later original.

A PRESCRIPTION *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes [u]. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiae* [v]. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable [w]. And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet* [x].

t 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory, should still continue to be reckoned from an aera so very antiquated. See Litt. §. 170. 34 Hen. VI. 37. 2 Roll. Abr. 269. pl. 16.

u Cro. Eliz. 511.

v Cro. Eliz. 479. 511. Sav. 3. Moor 910.

w *Ibid.* 479.

x *Ibid.* 511.

But

But ſpiritual perſons or corporations, as monaſteries, abbots, biſhops, and the like, were always capable of having their lands totally diſcharged of tithes, by various ways [y]; as, 1. By real compoſition: 2. By the pope's bull of exemption: 3. By unity of poſſeſſion; as when the rectory of a pariſh, and lands in the ſame pariſh, both belonged to a religious houſe, thoſe lands were diſcharged of tithes by this unity of poſſeſſion: 4. By preſcription; having never been liable to tithes, by being always in ſpiritual hands: 5. By virtue of their order; as the knights templars, ciſtercians, and others, whoſe lands were privileged by the pope with a diſcharge of tithes [z]. Though upon the diſſolution of abbeys by Henry VIII, moſt of theſe exemptions from tithes would have fallen with them, and the lands become titheable again: had they not been ſupported and upheld by the ſtatute 31 Hen. VIII. c. 13. which enacts, that all perſons who ſhould come to the poſſeſſion of the lands of any abbey then diſſolved, ſhould hold them free and diſcharged of tithes, in as large and ample a manner as the abbeys themſelves formerly held them. And from this original have ſprung all the lands, which, being in lay hands, do at preſent claim to be tithe-free: for, if a man can ſhew his lands to have been ſuch abbey lands, and alſo immemorially diſcharged of tithes by any of the means before-mentioned, this is now a good preſcription *de non decimando.* But he muſt ſhew both theſe requiſites: for abbey lands, without a ſpecial ground of diſcharge, are not diſcharged of courſe; neither will any preſcription *de non decimando* avail in total diſcharge of tithes, unleſs it relates to ſuch abbey lands.

III. COMMON, or right of common, appears from it's very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beaſts, to catch fiſh, to dig turf, to cut wood, or the like [a]. And hence common is chiefly of four ſorts; common of paſture, of piſcary, of turbary, and of eſtovers.

[y] Hob. 309. Cro. Jac. 308.
[z] 2 Rep. 44. Seld. tith. c. 13. §. 2.
[a] Finch, law. 157.

1. COM-

1. COMMON of pasture is a right of feeding one's beasts on another's land: for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross [b].

COMMON *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right: and it was originally permitted [c], not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England [d]. Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships [e], or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription [f], which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another;

b Co. Litt. 122.
c 2 Inst. 86.
d Stiernh. *de jure Sueonum*, *l.* 2. *c.* 6.
e Cro. Car. 482. 1 Jon. 397.
f Co. Litt. 121, 122.

other; the beaſts of the one ſtraying mutually into the other's fields, without any moleſtation from either. This is indeed only a permiſſive right, intended to excuſe what in ſtrictneſs is a treſpaſs in both, and to prevent a multiplicity of ſuits: and therefore either townſhip may encloſe and bar out the other, though they have intercommoned time out of mind. Neither hath any perſon of one town a right to put his beaſts originally into the other's common: but if they eſcape, and ſtray thither of themſelves, the law winks at the treſpaſs [g]. Common *in groſs*, or at large, is ſuch as is neither appendant nor appurtenant to land, but is annexed to a man's perſon; being granted to him and his heirs by deed; or it may be claimed by preſcriptive right, as by a parſon of a church, or the like corporation ſole. This is a ſeparate inheritance, entirely diſtinct from any landed property, and may be veſted in one who has not a foot of ground in the manor.

ALL theſe ſpecies, of paſturable common, may be and uſually are limited as to number and time; but there are alſo commons without ſtint, and which laſt all the year. By the ſtatute of Merton however, and other ſubſequent ſtatutes [h], the lord of a manor may encloſe ſo much of the waſte as he pleaſes, for tillage or woodground, provided he leaves common ſufficient for ſuch as are entitled thereto. This encloſure, when juſtifiable, is called in law "approving:" an ancient expreſſion ſignifying the ſame as "improving [i]." The lord hath the ſole intereſt in the ſoil; but the intereſt of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either againſt ſtrangers, or each other; the lord for the public injury, and each commoner for his private damage [k].

2, 3. COMMON of *piſcary* is a liberty of fiſhing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground [l]. There is alſo a common of digging for coals, minerals, ſtones, and the like. All theſe bear a reſemblance to common of paſture in many reſpects; though in one point they go much farther; common of paſture

g Co. Litt. 122.

h 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.

i 2 Inſt. 474.

k 9 Rep. 113.

l Co. Litt. 122.

being

being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

4. COMMON of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary [m].

THESE several species of commons do all originally result from the same necessity as common of pasture; *viz*. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A FOURTH species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if

[m] Co. Litt. 41.

the grantee leaves the country, he cannot aſſign over his right to any other; nor can he juſtify taking another perſon in his company [n]. A way may be alſo by preſcription; as if all the inhabitants of ſuch a hamlet, or all the owners and occupiers of ſuch a farm, have immemorially uſed to croſs ſuch a ground, for ſuch a particular purpoſe: for this immemorial uſage ſuppoſes an original grant, whereby a right of way thus appurtenant to land or houſes may clearly be created. A right of way may alſo ariſe by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the ſame time tacitly and impliedly gives me a way to come at it; and I may croſs his land for that purpoſe without treſpaſs [o]. For when the law doth give any thing to one, it giveth impliedly whatſoever is neceſſary for enjoying the ſame [p]. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleaſed: which was the eſtabliſhed rule in public as well as private ways. And the law of England, in both caſes, ſeems to correſpond with the Roman [q] (*a*).

V. OFFICES, which are a right to exerciſe a public or private employment, and to take the fees and emoluments thereunto belonging, are alſo incorporeal hereditaments: whether public, as thoſe of magiſtrates; or private, as of bailiffs, receivers, and the like. For a man may have an eſtate in them, either to him and his heirs, or for life, or for a term of years, or during pleaſure only: ſave only that offices of public truſt cannot be granted for a term of years, eſpecially if they concern the adminiſtration of juſtice, for then they

n Finch. law. 31.

o *Ibid.* 63.

p Co. Litt. 56.

q Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

(*a*) [In the caſe of Taylor *v.* Whitehead, Douglas 716, Trinity Term, 21 Geo. III. *K. B.* it was adjudged, that if a man has a right of way over another's land, he cannot juſtify going over the adjoining land becauſe the way was impaſſable from being overflowed by a river; and that there is a difference between public and private ways in this reſpect.]

might

might perhaps veſt in executors or adminiſtrators [r]. Neither can any *judicial* office be granted in reverſion; becauſe though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and inſufficient: but *miniſterial* offices may be ſo granted [s]; for thoſe may be executed by deputy. Alſo, by ſtatute 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) ſhall be ſold, under pain of diſability to diſpoſe of or hold it. For the law preſumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchaſe good, to the manifeſt detriment of the public.

VI. DIGNITIES bear a near relation to offices. Of the nature of theſe we treated at large in the former book [t]: it will therefore be here ſufficient to mention them as a ſpecies of incorporeal hereditaments, wherein a man may have a property or eſtate.

VII. FRANCHISES are a ſeventh ſpecies. Franchiſe and liberty are uſed as ſynonymous terms: and their definition is [u], a royal privilege, or branch of the king's prerogative, ſubſiſting in the hands of a ſubject. Being therefore derived from the crown, they muſt ariſe from the king's grant; or, in ſome caſes, may be held by preſcription, which, as has been frequently ſaid, preſuppoſes a grant. The kinds of them are various, and almoſt infinite: I will here briefly touch upon ſome of the principal; premiſing only, that they may be veſted in either natural perſons or bodies politic; in one man, or in many: but the ſame identical franchiſe, that has before been granted to one, cannot be beſtowed on another, for that would prejudice the former grant [w].

To be a county palatine is a franchiſe, veſted in a number of perſons. It is likewiſe a franchiſe for a number of perſons to be incorporated, and ſubſiſt as a body politic; with a power to maintain perpetual ſucceſſion and do other corporate acts: and each individual member of ſuch corporation is alſo ſaid to have a franchiſe or freedom. Other franchiſes are, to hold a court leet: to have a manor or lordſhip; or, at leaſt, to

[r] 9 Rep. 97.
[s] 11 Rep. 4.
[t] See book I. ch. 12.
[u] Finch. L. 164.
[w] 2 Roll. Abr. 191. Keilw. 196.

have a lordſhip paramount: to have waifs, wrecks, eſtrays, treaſure-trove, royal fiſh, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas; and trying cauſes: to have the cognizance of pleas; which is a ſtill greater liberty, being an excluſive right, ſo that no other court ſhall try cauſes ariſing within that juriſdiction: to have a bailiwick, or liberty exempt from the ſheriff of the county; wherein the grantee only, and his officers, are to execute all proceſs: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls muſt have a reaſonable cauſe of commencement, (as in conſideration of repairs, or the like,) elſe the franchiſe is illegal and void [x]: or, laſtly, to have a foreſt, chaſe, park, warren, or fiſhery, endowed with privileges of royalty; which ſpecies of franchiſe may require a more minute diſcuſſion.

As to a *foreſt*: this, in the hands of a ſubject, is properly the ſame thing with a chaſe; being ſubject to the common law, and not to the foreſt laws [y]. But a *chaſe* differs from a park, in that it is not incloſed, and alſo in that a man may have a chaſe in another man's ground as well as in his own; being indeed the liberty of keeping beaſts of chaſe or royal game therein, protected even from the owner of the land with a power of hunting them thereon. A *park* is an incloſed chaſe, extending only over a man's own grounds. The word *park* indeed properly ſignifies an encloſure; but yet it is not every field or common, which a gentleman pleaſes to ſurround with a wall or paling, and to ſtock with a herd of deer, that is thereby conſtituted a legal park: for the king's grant, or at leaſt immemorial preſcription, is neceſſary to make it ſo [z]. Though now the difference between a real park, and ſuch encloſed grounds, is in many reſpects not very material: only that it is unlawful at common law for any perſon to kill any beaſts of park or chaſe [a], except ſuch as poſſeſs theſe franchiſes

x 2 Inſt. 220.

y 4 Inſt. 314.

z Co. Litt. 233. 2 Inſt. 199. 11 Rep. 86.

a Theſe are properly buck, doe, fox, martin and roe; but in a common and legal ſenſe extend likewiſe to all the beaſts of the foreſt: which, beſides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beaſts of venary or hunting. (Co. Litt. 233.)

of forest, chase, or park. *Free-warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren [b]; which, being *ferae naturae*, every one had a natural right to kill as he could: but upon the introduction of the forest laws, at the Norman conquest, as will be shewn hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man therefore that has the franchise of warren, is in reality no more than a royal game-keeper: but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren [c]. This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in antient times, who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground [d]. A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feodal polity has prevailed [e]: though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested [f]. This opening was extended, by the second [g] and third [h] charters of Henry III, to those also that were fenced under Richard I; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II.

[b] The beasts are hares, conies, and roes: the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (*ibid.*)

[c] Salk. 637.

[d] Bro. *Abr. tit. Warren*. 3.

[e] Seld. *Mar. Claus. I.* 24. Dufresne. V. 503. Crag. *de Jur. feod. II.* 8. 15.

[f] *cap.* 47. *edit. Oxon.*

[g] *cap.* 20.

[h] 9 Hen. III. *c.* 16.

This differs from a *several* fishery; because he that has a several fishery must also be (or at least derive his right from) the owner of the soil [i], which in a free fishery is not requisite. It differs also from a *common* of piscary before-mentioned, in that the free fishery is an exclusive right, the common of piscary is not so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards [k]. Some indeed have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor [l]. But to consider such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowleged, that the rights and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities [m] which maintain, that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. CORODIES are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance [n]. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted [o]. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. ANNUITIES, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a

[i] M. 17 *Edw. IV.* 6. *P.* 18 *Edw. IV.* 4. *T.* 10 *Hen. VII.* 24. 26. Salk. 637.

[k] F. N. B. 88. Salk. 637.

[l] 2 Sid. 8.

[m] See them well digested in Hargrave's notes on Co. Litt. 122.

[n] Finch. L. 162.

[o] See book I. ch. 8.

rent-

rent-charge, with which it is frequently confounded; a rent-charge being a burthen impoſed upon and iſſuing out of *lands*, whereas an annuity is a yearly ſum chargeable only upon the *perſon* of the grantor [o]. Therefore, if a man by deed grant to another the ſum of 20*l*. *per annum*, without expreſſing out of what lands it ſhall iſſue, no land at all ſhall be charged with it; but it is a mere perſonal annuity: which is of ſo little account in the law, that, if granted to an eleemoſynary corporation, it is not within the ſtatutes of mortmain [p]; and yet a man may have a real eſtate in it, though his ſecurity is merely perſonal.

X. RENTS are the laſt ſpecies of incorporeal hereditaments. The word rent or render, *reditus*, ſignifies a compenſation or return, it being in the nature of an acknowlegement given for the poſſeſſion of ſome corporeal inheritance [q]. It is defined to be a certain profit iſſuing yearly out of lands and tenements corporeal. It muſt be a *profit*; yet there is no occaſion for it to be, as it uſually is, a ſum of money: for ſpurs, capons, horſes, corn, and other matters may be rendered, and frequently are rendered by way of rent [r]. It may alſo conſiſt in ſervices or manual operations; as, to plough ſo many acres of ground, to attend the king or the lord to the wars, and the like; which ſervices in the eye of the law are profits. This profit muſt alſo be *certain*; or that which may be reduced to a certainty by either party. It muſt alſo iſſue *yearly*; though there is no occaſion for it to iſſue every ſucceſſive year; but it may be reſerved every ſecond, third, or fourth year [s]: yet, as it is to be produced out of the profits of lands and tenements, as a recompenſe for being permitted to hold or enjoy them, it ought to be reſerved yearly, becauſe thoſe profits do annually ariſe and are annually renewed. It muſt *iſſue out* of the thing granted, and not be part of the land or thing itſelf; wherein it differs from an exception in the grant, which is always of part of the thing granted [t]. It muſt, laſtly, iſſue out of *lands and tenements corporeal*; that is, from ſome inheritance whereunto the owner or grantee of the

[o] Co. Litt. 144.
[p] *Ibid.* 2.
[q] *Ibid.* 144.
[r] Co. Litt. 142.
[s] *Ibid.* 47.
[t] Plowd. 13. 8 Rep. 71.

rent

rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like [u]. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt [w]: though it doth not affect the inheritance, and is no legal rent in contemplation of law.

THERE are at common law [x] three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called because it hath some corporal service incident to it, as at the least fealty or the feodal oath of fidelity [y]. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired [z]. A *rent-charge*, is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a rent-*charge* because in this manner the land is charged with a distress for the payment of it [a]. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

THERE are also other species of rents, which are reducible to these three. Rents of *assise* are the certain established rents of the freeholders and ancient copyholders of a manor [b], which cannot be departed from or varied. Those of the

[u] Co. Litt. 144.
[w] *Ibid.* 47.
[x] Litt. §. 213.
[y] Co. Litt. 142.
[z] Litt. §. 215.
[a] Co. Lit. 143.
[b] 2 Inst. 19.

freeholders are frequently called *chief* rents, *reditus capitales*; and both sorts are indifferently denominated *quit* rents, *quieti reditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were antiently called *white*-rents, or *blanch-farms*, *reditus albi* [c]; in contradistinction to rents reserved in work, grain, or baser money, which were called *reditus nigri* or *black mail* [d]. *Rack*-rent is only a rent of the full value of the tenement or near it. *(b)* A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one fourth of the value of the lands, at the time of it's reservation [e]: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years.

THESE are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in case of rents reserved upon lease [f].

RENT is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation [g]: but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country [h]. And, strictly, the rent is demandable and payable before the time of sun-set of the day whereon it is reserved [i]; though perhaps not absolutely due till midnight [k].

WITH regard to the original of rents, something will be said in the next chapter; and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redressed.

c In Scotland this kind of small payment is called *blanch-holding*, or *reditus albae firmae*.
d 2 Inst. 19.
e Co. Litt. 143.
f Stat. 4 Geo. II. c. 28.
g Co. Litt. 201.
h 4 Rep. 73.
i Co. Litt. 302. 1 Anderf. 253.
k 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

(b) See Douglas, Rep. 604. note 1. as to the definition of a fee-farm rent.

CHAPTER THE FOURTH.

OF THE FEODAL SYSTEM.

IT is impoſſible to underſtand, with any degree of accuracy, either the civil conſtitution of this kingdom, or the laws which regulate it's landed property, without ſome general acquaintance with the nature and doctrine of feuds, or the feodal law: a ſyſtem ſo univerſally received throughout Europe upwards of twelve centuries ago, that ſir Henry Spelman [a] does not ſcruple to call it the law of nations in our weſtern world. This chapter will be therefore dedicated to this inquiry. And though, in the courſe of our obſervations in this and many other parts of the preſent book, we may have occaſion to ſearch pretty highly into the antiquities of our Engliſh juriſprudence, yet ſurely no induſtrious ſtudent will imagine his time miſemployed, when he is led to conſider that the obſolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a ſcholarlike ſcientifical manner, without having recourſe to the antient. Nor will theſe reſearches be altogether void of rational entertainment as well as uſe: as in viewing the majeſtic ruins of Rome or Athens, of Balbec or Palmyra, it adminiſters both pleaſure and inſtruction to compare them with the draughts of the ſame edifices, in their priſtine proportion and ſplendor.

[a] of parliaments, 57.

THE conſtitution of feuds [b] had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the ſame *officina gentium*, as Crag very juſtly entitles it [c], poured themſelves in vaſt quantities into all the regions of Europe, at the declenſion of the Roman empire. It was brought by them from their own countries, and continued in their reſpective colonies as the moſt likely means to ſecure their new acquiſitions: and, to that end, large diſtricts or parcels of land were allotted by the conquering general to the ſuperior officers of the army, and by them dealt out again in ſmaller parcels or allotments to the inferior officers and moſt deſerving ſoldiers [d]. Theſe allotments were called *feoda*, feuds, fiefs, or fees; which laſt appellation in the northern languages [e] ſignifies a conditional ſtipend or reward [f]. Rewards or ſtipends they evidently were: and the condition annexed to them was, that the poſſeſſor ſhould do ſervice faithfully, both at home and in the wars, to him by whom they were given; for which purpoſe he took the *juramentum fidelitatis*, or oath of fealty [g]: and in caſe of the breach of this condition and oath, by not performing the ſtipulated ſervice, or by deſerting the lord in battle, the lands were again to revert to him who granted them [h].

ALLOTMENTS, thus acquired, naturally engaged ſuch as accepted them to defend them: and, as they all ſprang from

b See Spelman of feuds, and Wright of tenures, *per tot.*

c *De jure feod.* 19, 20.

d Wright, 7.

e Spelm. *Gl.* 216.

f Pontoppidan in his hiſtory of Norway, (page 290) obſerves, that in the northern languages odh ſignifies *proprietas* and all *totum*. Hence he derives the odhal right in thoſe countries; and thence too perhaps is derived the *udal* right in Finland, *&c.* (See Mac Doual Inſt. part. 2.) Now the tranſpoſition of theſe northern ſyllables, allodh, will give us the true etymology of the *allodium*, or abſolute property of the feudiſts: as, by a ſimilar combination of the latter ſyllable with the word fee (which ſignifies, we have ſeen, a conditional reward or ſtipend) feeodh or *feodum* will denote ſtipendiary property.

g See this oath explained at large in *Feud. l.* 2. *t.* 7.

h *Feud. l.* 2. *t.* 24.

the ſame right of conqueſt, no part could ſubſiſt independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others poſſeſſions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpoſe ſubordination, was neceſſary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewiſe ſubordinate to, and under the command of, his immediate benefactor or ſuperior; and ſo upwards to the prince or general himſelf: and the ſeveral lords were alſo reciprocally bound, in their reſpective gradations, to protect the poſſeſſions they had given. Thus the feodal connection was eſtabliſhed, a proper military ſubjection was naturally introduced, and an army of feudatories was always ready enliſted, and mutually prepared to muſter, not only in defence of each man's own ſeveral property, but alſo in defence of the whole, and of every part of this their newly-acquired country [i]; the prudence of which conſtitution was ſoon ſufficiently viſible in the ſtrength and ſpirit, with which they maintained their conqueſts.

THE univerſality and early uſe of this feodal plan, among all thoſe nations, which in complaiſance to the Romans we ſtill call barbarous, may appear from what is recorded [k] of the Cimbri and Teutones, nations of the ſame northern original as thoſe whom we have been deſcribing, at their firſt irruption into Italy about a century before the chriſtian æra. They demanded of the Romans, "*ut martius populus aliquid* "*ſibi terrae daret, quaſi ſtipendium: caeterum, ut vellet, mani-* "*bus atque armis ſuis uteretur.*" The ſenſe of which may be thus rendered; they deſired ſtipendiary lands (that is, feuds) to be allowed them, to be held by military and other perſonal ſervices, whenever their lords ſhould call upon them. This was evidently the ſame conſtitution, that diſplayed itſelf more fully about ſeven hundred years afterwards: when the Salii, Burgundians, and Franks broke in upon Gaul, the Viſigoths

[i] Wright, 8.

[k] *L. Florus, l.* 3. *c.* 3.

on

on Spain, and the Lombards upon Italy; and introduced with themſelves this northern plan of polity, ſerving at once to diſtribute and to protect the territories they had newly gained. And from hence too it is probable that the emperor Alexander Severus [l] took the hint, of dividing lands conquered from the enemy among his generals and victorious ſoldiery, duly ſtocked with cattle and bondmen, on condition of receiving military ſervice from them and their heirs for ever.

SCARCE had theſe northern conquerors eſtabliſhed themſelves in their new dominions, when the wiſdom of their conſtitutions, as well as their perſonal valour, alarmed all the princes of Europe; that is, of thoſe countries which had formerly been Roman provinces, but had revolted, or were deſerted by their old maſters, in the general wreck of the empire. Wherefore moſt, if not all, of them thought it neceſſary to enter into the ſame or a ſimilar plan of policy. For whereas, before, the poſſeſſions of their ſubjects were perfectly *allodial*, (that is, wholly independent, and held of no ſuperior at all) now they parcelled out their royal territories, or perſuaded their ſubjects to ſurrender up and retake their own landed property, under the like feodal obligations of military fealty [m]. And thus, in the compaſs of a very few years, the feodal conſtitution, or the doctrine of tenure, extended itſelf over all the weſtern world. Which alteration of landed property, in ſo very material a point, neceſſarily drew after it an alteration of laws and cuſtoms: ſo that the feodal laws ſoon drove out the Roman, which had hitherto univerſally obtained, but now became for many centuries loſt and forgotten; and Italy itſelf (as ſome of the civilians, with more ſpleen than judgment, have expreſſed it) *belluinas, atque ferinas, immaneſque Longobardorum leges accepit* [n].

l "*Sola, quae de hoſtibus capta ſunt, limitaneis ducibus & militibus donavit; ita ut eorum ita eſſent, ſi haeredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos, ſi etiam ſua rura defenderent. Addidit ſane his et animalia et ſervos, ut poſſent colere quod acceperant; ne per inopiam hominum vel per ſenectutem desererentur rura vicina barbariae, quod turpiſſimum ille ducebat.*" (Æl. Lamprid. *in vita Alex. Severi.*)

m Wright, 10.

n Gravin. *Orig. l.* 1. §. 139.

BUT this feodal polity, which was thus by degrees eftablifhed over all the continent of Europe, feems not to have been received in this part of our ifland, at leaft not univerfally and as a part of the national conftitution, till the reign of William the Norman [o]. Not but that it is reafonable to believe, from abundant traces in our hiftory and laws, that even in the times of the Saxons, who were a fwarm from what fir William Temple calls the fame northern hive, fomething fimilar to this was in ufe: yet not fo extenfively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly fettled in this ifland, at leaft as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe [p].

THIS introduction however of the feodal tenures into England, by king William, does not feem to have been effected immediately after the conqueft, nor by the mere arbitrary will and power of the conqueror; but to have been gradually eftablifhed by the Norman barons, and others, in fuch forfeited lands as they received from the gift of the conqueror, and afterwards univerfally confented to by the great council of the nation long after his title was eftablifhed. Indeed from the prodigious flaughter of the Englifh nobility at the battle of Haftings, and the fruitlefs infurrections of thofe who furvived, fuch numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extenfive poffeffions: which gave a handle to the monkifh hiftorians, and fuch as have implicitly followed them, to reprefent him as having by right of the fword feifed on all the lands of England, and dealt them out again to his own favourites. A fuppofition, grounded upon a miftaken fenfe of the word *conqueft*; which, in it's feodal acceptation, fignifies no more than *acquifition*: and this has led many hafty writers into a ftrange hiftorical miftake, and one which upon the flighteft examination will be found to be moft untrue. How-

[o] Spelm. *Gloff.* 218. Bract. *l.* 2. *c.* 16. §. 7. [p] Crag. *l.* 1. *t.* 4.

ever,

ever, certain it is, that the Normans now began to gain very large poſſeſſions in England; and their regard for the feodal law, under which they had long lived, together with the king's recommendation of this policy to the Engliſh, as the beſt way to put themſelves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reaſons that prevailed to effect it's eſtabliſhment here by law. And, though the time of this great revolution in our landed property cannot be aſcertained with exactneſs, yet there are ſome circumſtances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle [q], that in the nineteenth year of king William's reign an invaſion was apprehended from Denmark; and the military conſtitution of the Saxons being then laid aſide, and no other introduced in it's ſtead, the kingdom was wholly defenceleſs: which occaſioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppreſſed the people. This apparent weakneſs, together with the grievances occaſioned by a foreign force, might co-operate with the king's remonſtrances, and the better incline the nobility to liſten to his propoſals for putting them in a poſture of defence. For, as ſoon as the danger was over, the king held a great council to inquire into the ſtate of the nation [r]; the immediate conſequence of which was the compiling of the great ſurvey called domeſday-book, which was finiſhed in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders ſubmitted their lands to the yoke of military tenure, became the king's vaſals, and did homage and fealty to his perſon [s]. This may poſſibly have been the aera of formally introducing the feodal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is ſtill extant [t],

q *A. D.* 1085.

r *Rex tenuit magnum concilium, et graves ſermones habuit cum ſuis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. ibid.

s *Omnes praedia tenentes, quotquot eſſent notae melioris per totam Angliam, ejus homines facti ſunt, et omnes ſe illi ſubdidere, ejuſque facti ſunt vaſalli, ac ei fidelitatis juramenta praeſtiterunt, ſe contra alios quoſcunque illi fidos futuros.* Chron. Sax. A. D. 1086.

t *cap.* 52. Wilk. 228.

 and

and couched in these remarkable words: "*statuimus, ut omnes* "*liberi homines foedere et sacramento affirment, quod intra et* "*extra universum regnum Angliae Wilhelmo regi domino suo fi*-"*deles esse volunt; terras et honores illius omni fidelitate ubique* "*servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as sir Martin Wright has observed [u]) are plainly feodal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vasal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection [w], which exacts the performance of the military feodal services, as ordained by the general council. "*Omnes* "*comites, et barones, et milites, et servientes, et universi liberi* "*homines totius regni nostri praedicti, habeant et teneant se sem*-"*per bene in armis et in equis, ut decet et oportet: et sint semper* "*prompti et bene parati, ad servitium suum integrum nobis ex*-"*plendum et peragendum, cum opus fuerit; secundum quod nobis* "*debent de foedis et tenementis suis de jure facere, et sicut illis* "*statuimus per commune concilium totius regni nostri praedicti.*"

THIS new polity therefore seems not to have been *imposed* by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all it's allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vasals of the crown [x]. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually,

u Tenures, 65.

w *cap.* 58. Wilk. 288.

x Montesq. Sp. L. b. 31. c. 8.

by

by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation [y].

IN consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his "kingdom [z]; and that no man doth or can possess any part of "it, but what has mediately or immediately been derived as "a gift from him, to be held upon feodal services." For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feodal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feodal constitutions, and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations [a]; as if the English had, in fact as well as theory, owed every thing they had to the bounty of their sovereign lord.

OUR ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from

y Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. xlvii.)

z *Tout fuit in luy, et vient de luy al commencement.* (*M. 24 Edw. III.* 65.)

a Spelm. of feuds. c. 28.

 the

the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth [b]. However, this king, and his son William Rufus, kept up with a high hand all the rigours of the feodal doctrines: but their successor, Henry I. found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter [c], whereby he gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him: which at length produced the famous great charter at Runing-mead, which, with some alterations, was confirmed by his son Henry III. And, though it's immunities (especially as altered on it's last edition by his son [d]) are very greatly short of those granted by Henry I, it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

b Wright. 81.

c *LL. Hen. I. c.* 1.

d 9 *Hen. III.*

HAVING

HAVING given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century, or still remain in force.

THE grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was stiled the feudatory or *vasal*, which was only another name for the tenant or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vasal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vasals; which perpetuated among them the aera of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowlege.

BESIDES an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vasal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered,

 and

and holding up his hands both together between those of the lord, who sate before him; and there professing that "he "did become his *man*, from that day forth, of life and limb "and earthly honour:" and then he received a kiss from his lord [e]. Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* [f].

WHEN the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vasals of the inferior lords were bound by their fealty to attend their domestic courts baron [g], (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants,) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feodal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost

e Lit. §. 85.

f It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope. vi. 134. 8º.) It will not, I hope, be thought puerile to remark (in confirmation of this observation) that in one of our antient juvenile pastimes (the *king I am* or *basilinda* of Julius Pollux, *Onomastic. l.* 9. *c.* 7.) the ceremonies and language of feodal homage are preserved with great exactness.

g *Feud. l.* 2. *t.* 55.

almost every feodal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

AT the first introduction of feuds, as they were gratuitous, so also they were precarious and held at the *will* of the lord [h], who was then the sole judge whether his vasal performed his services faithfully. Then they became certain for one or more *years*. Among the antient Germans they continued only from year to year: an annual distribution of lands being made by their leaders in their general councils or assemblies [i]. This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should incroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory [k]. But still feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services [l]: and therefore infants, women, and professed monks, who were incapable of bear-

h *Feud. l. 1. t. 1.*

i Thus Tacitus: *(de mor. Germ. c. 26.)* "*agri ab universis per vices occupantur;* "*arva per annos mutant.*" And Caesar yet more fully: *(de bell. Gall. l. 6. c. 21.)* "*Neque quisquam agri modum certum,* "*aut fines proprios habet; sed magistra-* "*tus et principes, in annos singulos, gen-* "*tibus et cognationibus hominum qui una* "*coierunt, quantum eis et quo loco visum* "*est, attribuunt agri, atque anno post alio* "*transire cogunt.*"

k *Feud. l. 1. t. 1.*

l Wright. 14.

ing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowlegement to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or in the words of the feodal writers, "*incertam et caducam hereditatem relevabat.*" This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

FOR in process of time feuds came by degrees to be universally extended, beyond the life of the first vasal, to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions: and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation [m]. But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal succession, that "none was capable of inheriting "a feud, but such as was of the blood of, that is, lineally de"scended from, the first feudatory [n]." And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feodal union) and *honorary* feuds (or titles of nobility) being now introduced, which were not of

m Wright. 17. n *Ibid.* 183.

a di-

a divisible nature, but could only be inherited by the eldest son [o]; in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest [p].

OTHER qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord [q]. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who might prove less able. And, as the feodal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vasal, than the vasal could his feud without consent of his lord [r]: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vasal should owe subjection to a superior not of his own choosing.

THESE were the principal, and very simple, qualities of the genuine or original feuds; which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feodal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty, to do suit of court, to answer the stipu-

o *Feud.* 2. *t.* 55.
p Wright. 32.
q *Ibid.* 29.
r *Ibid.* 30.

lated

lated renders or rent-service, and to promote the welfare of their immediate superiors or lords[s]. But this at the same time demolished the antient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprized all such as do not fall within the other description: such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine, and proper feud[t].

BUT as soon as the feodal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert it's influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters.

[s] Wright. 20.

[t] *Feud.* 2. *t.* 7.

CHAPTER THE FIFTH.

OF THE ANTIENT ENGLISH TENURES.

IN this chapter we ſhall take a ſhort view of the antient tenures of our Engliſh eſtates, or the manner in which lands, tenements and hereditaments might have been holden; as the ſame ſtood in force, till the middle of the laſt century. In which we ſhall eaſily perceive, that all the particularities, all the ſeeming and real hardſhips, that attended thoſe tenures, were to be accounted for upon feodal principles and no other; being fruits of, and deduced from, the feodal policy.

ALMOST all the real property of this kingdom is by the policy of our laws ſuppoſed to be granted by, dependent upon, and *holden* of ſome ſuperior lord, by and in conſideration of certain ſervices to be rendered to the lord by the tenant or poſſeſſor of this property. The thing holden is therefore ſtiled a *tenement*, the poſſeſſors thereof *tenants*, and the manner of their poſſeſſion a *tenure*. Thus all the land in the kingdom is ſuppoſed to be holden, mediately or immediately, of the king; who is ſtiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior perſons, became alſo lords with reſpect to thoſe inferior perſons, as they were ſtill tenants with reſpect to the king; and, thus partaking of a middle nature, were called *meſne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was ſaid to hold

of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king therefore was ſtiled lord paramount; A was both tenant and lord, or was a meſne lord; and B was called tenant *paravail*, or the loweſt tenant; being he who was ſuppoſed to make avail, or profit, of the land [a]. In this manner are all the lands of the kingdom holden, which are in the hands of ſubjects: for according to ſir Edward Coke [b], in the law of England we have not properly *allodium*; which, we have ſeen [c], is the name by which the feudiſts abroad diſtinguiſh ſuch eſtates of the ſubject, as are not holden of any ſuperior. So that at the firſt glance we may obſerve, that our lands are either plainly feuds, or partake very ſtrongly of the feodal nature.

ALL tenures being thus derived, or ſuppoſed to be derived, from the king, thoſe that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the moſt honourable ſpecies of tenure, but at the ſame time ſubjected the tenants to greater and more burthenſome ſervices, than inferior tenures did [d]. This diſtinction ran through all the different ſorts of tenure; of which I now proceed to give an account.

I. THERE ſeem to have ſubſiſted among our anceſtors four principal ſpecies of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the ſeveral ſervices or renders, that were due to the lords from their tenants. The ſervices, in reſpect of their quality, were either *free* or *baſe* ſervices; in reſpect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* ſervices were ſuch as were not unbecoming the character of a ſoldier, or a freeman to perform; as to ſerve

a 2 Inſt. 296.

b 1 Inſt. 1.

c pag. 47.

d In the Germanic conſtitution, the electors, the biſhops, the ſecular princes, the imperial cities, &c. which hold directly from the emperor, are called the *immediate* ſtates of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hiſt. xlii. 61.

under his lord in the wars, to pay a ſum of money, and the like. *Baſe* ſervices were ſuch as were fit only for peaſants, or perſons of a ſervile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* ſervices, whether free or baſe, were ſuch as were ſtinted in quantity, and could not be exceeded on any pretence; as, to pay a ſtated annual rent, or to plough ſuch a field for three days. The *uncertain* depended upon unknown contingencies: as, to do military ſervice in perſon, or pay an aſſeſſment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free ſervices: or to do whatever the lord ſhould command; which is a baſe or villein ſervice.

FROM the various combinations of theſe ſervices have ariſen the four kinds of lay tenure which ſubſiſted in England, till the middle of the laſt century; and three of which ſubſiſt to this day. Of theſe Bracton (who wrote under Henry the third) ſeems to give the cleareſt and moſt compendious account, of any author antient or modern [e]; of which the following is the outline or abſtract [f]. "Tenements are of two kinds, *frank-tenement*, and *villenage*. "And, of frank-tenements, ſome are held freely in conſideration of homage and *knight-ſervice*; others in *free-ſocage* with the ſervice of fealty only." And again [g], "of villenages ſome are pure, and others privileged. He that holds in *pure villenage* ſhall do whatſoever is commanded him, and always be bound to an uncertain ſervice. The other kind of villenage is called *villein ſocage*; and theſe villein-ſocmen do villein ſervices, but ſuch as are certain and determined." Of which the ſenſe ſeems to be as follows: firſt, where the ſervice was *free*, but *uncertain*, as military ſervice with homage, that tenure was called the tenure in chivalry,

[e] *l. 4. tr. 1. c. 28.*

[f] *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et ſervitio militari; aliud in libero ſocagio cum fidelitate tantum.* §. 1.

[g] *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et ſemper tenebitur ad incerta. Aliud genus villenagii dicitur villanum ſocagium; et hujuſmodi villani ſocmanni—villana faciunt ſervitia, ſed certa et determinata.* §. 5.

chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c. that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile: as, thirdly, where the service was *base* in it's nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in it's nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called socage (from the *certainty* of it's services) but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

I. THE first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law-French *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans[h], which name is expresly given it by the Mirrour[i]. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feodal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I, was estimated at twelve ploughlands[k], and it's value (though it varied with the times[l],) in the reigns of Edward I. and Edward II[m], was stated at 20 *l. per annum*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon[n]: which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to at-

h Spelm. *Gloss.* 219.

i c. 2. §. 27.

k *Pasch.* 3 Edw. I. Co. Litt. 69.

l 2 Inst. 596.

m Stat. Westm. 1. c. 36. Stat. *de milit.* 1 Edw. II. Co. Litt. 69.

n See writs for this purpose in *Memorand. Scacch.* 36. prefixed to Maynard's yearbook. Edw. II.

tend

tend twenty days, and so in proportion [n]. And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feodal system.

THIS tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi* [o]; was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; *viz.* aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and shew to be of feodal original.

1. AIDS were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress [p]; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feodal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vasal's power, was by the strict rigour of the feodal law an absolute forfeiture of his estate [q]. Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms [r]: the intention of it being to breed up the eldest son and heir apparent of the seignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely slender; few lords being able to save much out of

n Litt. §. 95.

o Co. Litt. 9.

p *Auxilia fiunt de gratia et non de jure,—cum dependeant ex gratia tenentium et non ad voluntatem dominorum.* Bracton. *l.* 2. *tr.* 1. *c.* 16. §. 8.

q *Feud. l.* 2. *t.* 24.

r 2 Inst. 233.

their

their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms: nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants [s]. And one cannot but observe, in this particular, the great resemblance which the lord and vasal of the feodal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; *viz.* to marry the patron's daughter; to pay his debts; and to redeem his person from captivity [t].

BUT besides these antient feodal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans,) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior. To prevent this abuse, king John's *magna carta* [u] ordained, that no aids be taken by the king without consent of parliament, nor in any wise by inferior lords, save only the three antient ones above-mentioned. But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edw. I, when the statute called *confirmatio chartarum* was enacted; which in this respect revived king John's charter, by ordaining that none but the antient aids should be taken. But though the species of aids was thus restrained, yet the quantity

[s] Philips's life of Pole I. 223.

[t] *Erat autem haec inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul. Manutius *de senatu Romano.* c. 1.

[u] *cap.* 12. 15.

of

of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable [w]; and that the aids taken by the king of his tenants *in capite* should be settled by parliament [x]. But they were never completely ascertained and adjusted till the statute Westm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the king's tenants *in capite* by statute 25 Edw. III. c. 11. The other aid, for ransom of the lord's person, being not in it's nature capable of any certainty, was therefore never ascertained.

2. RELIEF, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But, though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir [y]. The English ill brooked this consequence of their new adopted policy; and therefore William the conqueror by his laws [z] *ascertained* the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms, and habiliments of war, should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s*. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws: thereby in effect obliging every heir to new-purchase or *redeem* his land [a]: but his brother Henry I, by the charter before-mentioned, restored his father's law;

[w] *cap.* 15.
[x] *Ibid.* 14.
[y] Wright. 99.
[z] c. 22, 23, 24.
[a] 2 Roll. Abr. 514.

and ordained, that the relief to be paid ſhould be according to the law ſo eſtabliſhed, and not an arbitrary redemption [b]. But afterwards, when, by an ordinance in 27 Hen. II. called the aſſiſe of arms, it was provided that every man's armour ſhould deſcend to his heir, for defence of the realm; and it thereby became impracticable to pay theſe acknowlegements in arms, according to the laws of the conqueror, the compoſition was univerſally accepted of 100*s*. for every knight's fee; as we find it ever after eſtabliſhed [c]. But it muſt be remembered, that this relief was only then payable, if the heir at the death of his anceſtor had attained his full age of one and twenty years.

3. PRIMER *ſeiſin* was a feodal burthen, only incident to the king's tenants *in capite*, and not to thoſe who held of inferior or meſne lords. It was a right which the king had, when any of his tenants *in capite* died ſeiſed of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate poſſeſſion; and half a year's profits, if the lands were in reverſion expectant on an eſtate for life [d]. This ſeems to be little more than an additional relief, but grounded upon this feodal reaſon; that, by the antient law of feuds, immediately upon a death of a vaſal the ſuperior was entitled to enter and take ſeiſin or poſſeſſion of the land, by way of protection againſt intruders, till the heir appeared to claim it, and receive inveſtiture: during which interval the lord was entitled to take the profits; and, unleſs the heir claimed within a year and day, it was by the ſtrict law a forfeiture [e]. This practice however ſeems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, the *prima ſeiſina* was expreſsly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradiſtinction to other lords [f]. The king was entitled to enter and receive the whole

b "*Haeres non redimet terram ſuam* "*ſicut faciebat tempore fratris mei, ſed* "*legitima et juſta relevatione relevabit* "*eam.*" (*Text. Roffens. cap.* 34.)

c Glanv. *l.* 9. *c.* 4. Litt. §. 112.

d Co. Litt. 77.

e *Feud. l.* 2. *t.* 24.

f Stat. Marlbr. c. 16. 17 Edw. II. c. 3.

whole profits of the land, till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feodal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land [g]. And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiae*, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female [h], the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen: yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3 Edw. I. c. 22. the two additional years being given by the legislature for no other reason but merely to benefit the lord [i].

THIS wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord,

g Staundf. Prerog. 12.
h Litt. §. 103.
i *Ibid.*

 that

that he might out of the profits thereof provide a fit perſon to ſupply the infant's ſervices, till he ſhould be of age to perform them himſelf. And, if we conſider the feud in it's original import, as a ſtipend, fee, or reward for actual ſervice, it could not be thought hard that the lord ſhould withhold the ſtipend, ſo long as the ſervice was ſuſpended. Though undoubtedly to our Engliſh anceſtors, where ſuch a ſtipendiary donation was a mere ſuppoſition or figment, it carried abundance of hardſhip; and accordingly it was relieved by the charter of Henry I. before-mentioned, which took this cuſtody from the lord, and ordained that the cuſtody, both of the land and the children, ſhould belong to the widow or next of kin. But this noble immunity did not continue many years.

THE wardſhip of the body was a conſequence of the wardſhip of the land; for he who enjoyed the infant's eſtate was the propereſt perſon to educate and maintain him in his infancy: and alſo, in a political view, the lord was moſt concerned to give his tenant a ſuitable education, in order to qualify him the better to perform thoſe ſervices which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty-one, or the heir-female to that of ſixteen, they might ſue out their livery or *ouſterlemain*[k]; that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this ſeems expreſsly contrary to *magna carta*[l]. However, in conſideration of their lands having been ſo long in ward, they were excuſed all reliefs, and the king's tenants alſo all primer ſeiſins[m]. In order to aſcertain the profits that aroſe to the crown by theſe fruits of tenure, and to grant the heir his livery, the itinerant juſtices, or juſtices in eyre, had it formerly in charge to make inquiſition concerning them by a jury of the county[n], commonly called an *inquiſitio poſt mortem*; which was inſtituted to inquire (at the death of any man of fortune) the value of his eſtate, the tenure by which it was

k Co. Litt. 77.
l 9 Hen. 3. c. 3.
m Co. Litt. 77.
n Hoveden. *ſub Ric. I.*

holden,

holden, and who, and of what age his heir was; thereby to aſcertain the relief and value of the primer ſeiſin, or the wardſhip and livery accruing to the king thereupon. A manner of proceeding that came in proceſs of time to be greatly abuſed, and at length an intolerable grievance; it being one of the principal accuſations againſt Empſon and Dudley, the wicked engines of Henry VII, that by colour of falſe inquiſitions they compelled many perſons to ſue out livery from the crown, who by no means were tenants thereunto [o]. And, afterwards, a court of wards and liveries was erected [p], for conducting the ſame inquiries in a more ſolemn and legal manner.

WHEN the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, he was to receive the order of knighthood, and was compellable to take it upon him, or elſe pay a fine to the king. For, in thoſe heroical times, no perſon was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and ſolemnity. We may plainly diſcover the footſteps of a ſimilar cuſtom in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, preſented them in a full aſſembly with a ſhield and lance; which ceremony, as was formerly hinted [q], is ſuppoſed to have been the original of the feodal knighthood [r]. This prerogative, of compelling the king's vaſals to be knighted, or to pay a fine, as expreſsly recognized in parliament, by the ſtatute *de militibus*, 1 Edw. II; was exerted as an expedient for raiſing money by many of our beſt princes, particularly by Edward VI and queen Elizabeth; but yet was the occaſion of heavy murmurs when exerted by Charles I: among whoſe many misfortunes it was, that neither himſelf nor his people ſeemed able to diſtinguiſh between the arbitrary ſtretch, and the legal exertion, of prerogative. However, among the

o 4 Inſt. 198.

p Stat. 32 Hen. VIII. c. 46.

q Vol. I. pag. 404.

r "*In ipſo concilio vel principum aliquis, vel pater, vel propinquus, ſcuto frameaque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domus pars videntur; mox reipublicae.*" *De mor. Germ. cap.* 13.

dal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenant, to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowlegement on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but, as to common persons, they were at liberty, by *magna carta* [g], and the statute of *quia emptores* [h], (if not earlier) to aliene the whole of their estate, to be holden of the same lord, as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not aliene without a licence: for if they did, it was in antient strictness an absolute forfeiture of the land [i]; though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III. c. 12. which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but, if the tenant presumed to aliene without a licence, a full year's value should be paid [k].

7. THE last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out

g *cap.* 32.
h 18 Edw. I. c. 1.
i 2 Inst. 66.
k *Ibid.* 67.

and aboliſhed. In ſuch caſes the land eſcheated, or fell back, to the lord of the fee [l]; that is, the tenure was determined by breach of the original condition, expreſſed or implied in the feodal donation. In the one caſe, there were no heirs ſubſiſting of the blood of the firſt feudatory or purchaſer, to which heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, ſhewed that he was no longer to be truſted as a vaſal, having forgotten his duty as a ſubject; and therefore forfeited his feud, which he held under the implied condition that he ſhould not be a traitor or a felon. The conſequence of which in both caſes was, that the gift, being determined, reſulted back to the lord who gave it [m].

THESE were the principal qualities, fruits, and conſequences of the tenure by knight-ſervice: a tenure, by which the greateſt part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the laſt century; and which was created, as ſir Edward Coke expreſsly teſtifies [n], for a military purpoſe; *viz.* for defence of the realm by the king's own principal ſubjects, which was judged to be much better than to truſt to hirelings or foreigners. The deſcription here given is that of knight-ſervice proper; which was to attend the king in his wars. There were alſo ſome other ſpecies of knight-ſervice; ſo called, though improperly, becauſe the ſervice or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-ſervice proper, and becauſe they were attended with ſimilar fruits and conſequences. Such was the tenure by *grand ſerjeanty per magnum ſervitium*, whereby the tenant was bound, inſtead of ſerving the king *generally* in his wars, to do ſome ſpecial honorary ſervice to the king in perſon; as to carry his banner, his ſword, or the like; or to be his butler, champion, or other officer, at his coronation [o]. It was in moſt other reſpects like knight-ſervice [p]; only he was not bound to pay aid [q], or eſcuage [r];

l Co. Litt. 13.
m *Feud. l.* 2. *t.* 86.
n 4 Inſt. 192.
o Litt. §. 153.
p *Ibid.* §. 158.
q 2 Inſt. 233.
r Litt. §. 158.

and,

and, when tenant by knight-ſervice paid five pounds for a relief on every knight's fee, tenant by grand ſerjeanty paid one year's value of his land, were it much or little [s]. Tenure by *cornage*, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's ſubjects, was (like other ſervices of the ſame nature) a ſpecies of grand ſerjeanty [t].

THESE ſervices, both of chivalry and grand ſerjeanty, were all perſonal, and uncertain as to their quantity or duration. But, the perſonal attendance in knight-ſervice growing troubleſome and inconvenient in many reſpects, the tenants found means of compounding for it; by firſt ſending others in their ſtead, and in proceſs of time making a pecuniary ſatisfaction to the lords in lieu of it. This pecuniary ſatisfaction at laſt came to be levied by aſſeſſments, at ſo much for every knight's fee; and therefore this kind of tenure was called *ſcutagium* in Latin, or *ſervitium ſcuti*; *ſcutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *eſcuage*; being indeed a pecuniary, inſtead of a military, ſervice. The firſt time this appears to have been taken was in the 5 Hen. II, on account of his expedition to Toulouſe; but it ſoon came to be ſo univerſal, that perſonal attendance fell quite into diſuſe. Hence we find in our antient hiſtories, that, from this period, when our kings went to war, they levied ſcutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenſes, and to hire troops: and theſe aſſeſſments, in the time of Henry II, ſeem to have been made arbitrarily and at the king's pleaſure. Which prerogative being greatly abuſed by his ſucceſſors, it became matter of national clamour; and king John was obliged to conſent, by his *magna carta*, that no ſcutage ſhould be impoſed without conſent of parliament [u]. But this clauſe was omitted in his ſon Henry III's charter; where we only find [w], that ſcutages

s *Ibid.* §. 154.

t *Ibid.* §. 156.

u *Nullum ſcutagium ponatur in regno noſtro, niſi per commune conſilium regni noſtri. cap.* 12.

w *cap.* 37.

or escuage should be taken as they were used to be taken in the time of Henry II: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I. c. 5 & 6. and many subsequent statutes[x] it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament[y]; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

SINCE therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton[z] must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected[a] as a tenure in chivalry[b]. But as the actual service was uncertain, and depended upon emergences, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergences. For had the escuage been a settled invariable sum payable at certain times, it had been neither more nor less than a mere pecuniary rent: and the tenure, instead of knight-service, would have then been of another kind, called socage[c], of which we shall speak in the next chapter.

FOR the present I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of

x See Vol. I. pag. 140.

y Old Ten. *tit. Escuage.*

z §. 103.

a Wright. 122.

b *Pro feodo militari reputatur.* Flet. *l.* 2. *c.* 14. §. 7.

c Litt. §. 97, 120.

tenures

tenures now tended to nothing elſe, but a wretched means of raiſing money to pay an army of occaſional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in conſequence of the fiction adopted after the conqueſt) were introduced and laid upon them by the ſubtlety and fineſſe of the Norman lawyers. For, beſides the ſcutages to which they were liable in defect of perſonal attendance, which however were aſſeſſed by themſelves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldeſt ſon was to be knighted or his eldeſt daughter married; not to forget the ranſom of his own perſon. The heir, on the death of his anceſtor, if of full age, was plundered of the firſt emoluments ariſing from his inheritance, by way of *relief* and *primer ſeiſin;* and, if under age, of the whole of his eſtate during infancy. And then, as ſir Thomas Smith[d] very feelingly complains, "when he came to his own, after "he was out of *wardſhip*, his woods decayed, houſes fallen "down, ſtock waſted and gone, lands let forth and plough-"ed to be barren," to reduce him ſtill farther, he was yet to pay half a year's profits as a fine for ſuing out his *livery;* and alſo the price or value of his *marriage*, if he refuſed ſuch wife as his lord and guardian had bartered for, and impoſed upon him; or twice that value, if he married another woman. Add to this, the untimely and expenſive honour of *knighthood*, to make his poverty more completely ſplendid. And when by theſe deductions his fortune was ſo ſhattered and ruined, that perhaps he was obliged to ſell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

A SLAVERY ſo complicated, and ſo extenſive as this, called aloud for a remedy in a nation that boaſted of it's freedom. Palliatives were from time to time applied by ſucceſſive acts of parliament, which aſſuaged ſome temporary grievances. Till at length the humanity of king James I conſented[e], in conſideration of a proper equivalent, to aboliſh them all;

[d] Commonw. l. 3. c. 5.

[e] 4 Inſt. 202.

though the plan proceeded not to effect; in like manner as he had formed a ſcheme, and began to put it in execution, for removing the feodal grievance of heritable juriſdictions in Scotland [f], which has ſince been purſued and effected by the ſtatute 20 Geo. II. c. 43 [g]. King James's plan for exchanging our military tenures ſeems to have been nearly the ſame as that which has been ſince purſued; only with this difference, that, by way of compenſation for the loſs which the crown and other lords would ſuſtain, an annual feefarm rent was to have been ſettled and inſeparably annexed to the crown, and aſſured to the inferior lords, payable out of every knight's fee within their reſpective ſeignories. An expedient, ſeemingly much better than the hereditary exciſe, which was afterwards made the principal equivalent for theſe conceſſions. For at length the military tenures, with all their heavy appendages (having during the uſurpation been diſcontinued) were deſtroyed at one blow by the ſtatute 12 Car. II. c. 24. which enacts, "that the court of wards and liveries, "and all wardſhips, liveries, primer-ſeiſins, and ouſterlemains, values and forfeitures of marriages, by reaſon of "any tenure of the king or others, be totally taken away. "And that all fines for alienations, tenures by homage, "knights-ſervice, and eſcuage, and alſo aids for marrying "the daughter or knighting the ſon, and all tenures of the "king *in capite*, be likewiſe taken away. And that all ſorts "of tenures, held of the king or others, be turned into free "and common ſocage; ſave only tenures in frankalmoign, "copyholds, and the honorary ſervices (without the ſlaviſh "part) of grand ſerjeanty." A ſtatute, which was a greater acquiſition to the civil property of this kingdom than even *magna carta* itſelf: ſince that only pruned the luxuriances that had grown out of the military tenures, and thereby preſerved them in vigour; but the ſtatute of king Charles extirpated the whole, and demoliſhed both root and branches.

[f] Dalrymp. of feuds. 292.

[g] By another ſtatute of the ſame year (20 Geo. II. c. 50.) the tenure of *wardholding* (equivalent to the knight-ſervice of England) is for ever aboliſhed in Scotland.

CHAPTER THE SIXTH.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppreſſive or military part of the feodal conſtitution was happily done away, yet we are not to imagine that the conſtitution itſelf was utterly laid aſide, and a new one introduced in it's room: ſince by the ſtatute 12 Car. II. the tenures of ſocage and frankalmoign, the honorary ſervices of grand ſerjeanty, and the tenure by copy of court roll were reſerved; nay all tenures in general, except frankalmoign, grand ſerjeanty, and copyhold, were reduced to one general ſpecies of tenure, then well known and ſubſiſting, called free and common ſocage. And this, being ſprung from the ſame feodal original as the reſt, demonſtrates the neceſſity of fully contemplating that antient ſyſtem; ſince it is that alone to which we can recur, to explain any ſeeming or real difficulties, that may ariſe in our preſent mode of tenure.

THE military tenure, or that by knight-ſervice, conſiſted of what were reputed the moſt free and honourable ſervices, but which in their nature were unavoidably uncertain in reſpect to the time of their performance. The ſecond ſpecies of tenure, or *free-ſocage*, conſiſted alſo of free and honourable ſervices; but ſuch as were liquidated and reduced to an abſolute certainty. And this tenure not only ſubſiſts to this day, but has in a manner abſorbed and ſwallowed up (ſince the ſtatute

ſtatute of Charles the ſecond) almoſt every other ſpecies of tenure. And to this we are next to proceed.

II. SOCAGE, in it's moſt general and extenſive ſignification, ſeems to denote a tenure by any certain and determinate ſervice. And in this ſenſe it is by our antient writers conſtantly put in oppoſition to chivalry, or knight-ſervice, where the render was precarious and uncertain. Thus Bracton [a]; if a man holds by a rent in money, without any eſcuage or ſerjeanty, "*id tenementum dici poteſt ſocagium*:" but if you add thereto any royal ſervice, or eſcuage to any, the ſmalleſt, amount, "*illud dici poterit feodem militare.*" So too the author of Fleta [b]; "*ex donationibus, ſervitia militaria vel magnae* "*ſerjantiae non continentibus, oritur nobis quoddam nomen gene-* "*rale, quod eſt ſocagium.*" Littleton alſo [c] defines it to be, where the tenant holds his tenement of the lord by any *certain* ſervice, in lieu of all other ſervices; ſo that they be not ſervices of chivalry, or knight-ſervice. And therefore afterwards [d] he tells us, that whatſoever is not tenure in chivalry is tenure in ſocage: in like manner as it is defined by Finch [e], a tenure to be done out of war. The ſervice muſt therefore be certain, in order to denominate its ſocage; as to hold by fealty and 20*s.* rent; or, by homage, fealty, and 20*s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal ſervice, as ploughing the lord's land for three days; or, by fealty only without any other ſervice: for all theſe are tenures in ſocage [f].

BUT ſocage, as was hinted in the laſt chapter, is of two ſorts: *free*-ſocage, where the ſervices are not only certain, but honourable: and *villein*-ſocage, where the ſervices, though certain, are of a baſer nature. Such as hold by the former tenure are called in Glanvil [g], and other ſubſequent authors, by the name of *liberi ſokemanni*, or tenants in free-ſocage. Of this tenure we are firſt to ſpeak; and this, both in the na-

a *l.* 2. *c.* 16. §. 9.
b *l.* 3. *c.* 14. §. 9.
c §. 117.
d §. 118.
e L. 147.
f Litt. §. 117, 118, 119.
g *l.* 3. *c.* 7.

ture

ture of it's ſervice, and the fruits and conſequences, appertaining thereto, was always by much the moſt free and independent ſpecies of any. And therefore I cannot but aſſent to Mr Somner's etymology of the word [h]: who derives it from the Saxon appellation *ſoc*, which ſignifies liberty or privilege, and, being joined to a uſual termination, is called *ſocage*, in Latin *ſocagium*; ſignifying thereby a free or privileged tenure [i]. This etymology ſeems to be much more juſt than that of our common lawyers in general, who derive it from *ſoca*, an old Latin word denoting (as they tell us) a plough: for that in antient time this ſocage tenure conſiſted in nothing elſe but ſervices of huſbandry, which the tenant was bound to do to his lord, as to plough, ſow, or reap for him; but that in proceſs of time, this ſervice was changed into an annual rent by conſent of all parties, and that, in memory of it's original, it ſtill retains the name of a ſocage or plough-ſervice [k]. But this by no means agrees with what Littleton himſelf tells us [l], that to hold by fealty only, without paying any rent, is tenure in ſocage; for here is plainly no commutation for plough-ſervice. Beſides, even ſervices, confeſſedly of a military nature and original, (as eſcuage, which, while it remained uncertain, was equivalent to knight-ſervice,) the inſtant they were reduced to a certainty changed both their name and nature, and were called ſocage [m]. It was the *certainty* therefore that denominated it a ſocage tenure; and nothing ſure could be a greater liberty or privilege, than to have the ſervice aſcertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore alſo Britton, who deſcribes lands in ſocage tenure under the name of *fraunke ferme* [n], tells us, that they are "lands "and tenements, whereof the nature of the fee is changed "by feoffment *out of chivalry* for *certain* yearly ſervices, and "in reſpect whereof neither homage, ward, marriage, nor "relief can be demanded." Which leads us alſo to another

h Gavelk. 138.

i In like manner Skene in his expoſition of the Scots' law, title *ſocage*, tells us, that it is 'ane kind of holding of 'lands, quhen ony man is inſeft *freely*,' &c.

k Litt. §. 19.

l §. 118.

m Litt. §. 98. 120.

n c. 66.

observation,

observation, that if socage tenures were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to *fraunk ferme* or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.

TAKING this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but at the same time more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure [o]; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.

As therefore the grand criterion and distinguishing mark of this species of tenure are the having it's renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

WE may remember, that by the statute 12 Car. II. grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, &c. at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's per-

[o] Wright. 211.

ſon. Petit ſerjeanty, as defined by Littleton [p], conſiſts in holding lands of the king by the ſervice of rendering to him annually ſome ſmall implement of war, as a bow, a ſword, a lance, an arrow, or the like. This, he ſays [q], is but ſocage in effect; for it is no perſonal ſervice, but a certain rent: and, we may add, it is clearly no predial ſervice, or ſervice of the plough, but in all reſpects *liberum et commune ſocagium*; only being held of the king, it is by way of eminence dignified with the title of *parvum ſervitium regis*, or petit ſerjeanty. And *magna carta* reſpected it in this light, when it enacted [r], that no wardſhip of the lands or body ſhould be claimed by the king in virtue of a tenure by petit ſerjeanty.

TENURE in *burgage* is deſcribed by Glanvil [s], and is expreſsly ſaid by Littleton [t], to be but tenure in ſocage: and it is where the king or other perſon is lord of an antient borough, in which the tenements are held by a rent certain [u]. It is indeed only a kind of town ſocage; as common ſocage, by which other lands are holden, is uſually of a rural nature. A borough, as we have formerly ſeen, is uſually diſtinguiſhed from other towns by the right of ſending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houſes, or lands which were formerly the ſcite of houſes, in an antient borough, are held of ſome lord in common ſocage, by a certain eſtabliſhed rent. And theſe ſeem to have withſtood the ſhock of the Norman encroachments principally on account of their inſignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would ſcarce have amounted to a knight's fee. Beſides, the owners of them, being chiefly artificers and perſons engaged in trade, could not with any tolerable propriety be put on ſuch a military eſtabliſhment, as the tenure in chivalry was. And here alſo we have again an inſtance, where a tenure is confeſſedly in ſocage, and yet could not poſſibly ever have been held by plough-ſervice; ſince the te-

p §. 159.
q §. 160.
r *cap.* 27.
s *lib.* 7. *cap.* 3.
t §. 162.
u Litt. § 162, 163.

nants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in antient burgage: the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil [w], and by Littleton [x]; *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton [y] gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors [z] have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest son; who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta)* till abolished by Malcolm III [a]. And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one be-

[w] *ubi supra.*
[x] §. 165.
[y] § 211.
[z] 3 Mod. Pref.
[a] Seld. tit. of hon. 2. 1. 47. *Reg. Mag. l.* 4. c. 31.

came his heir [b]. So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements [c], and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will [d], which, in general, was not permitted after the conquest till the reign of Henry the eighth; though in the Saxon times it was allowable [e]. A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

THE nature of the tenure in *gavelkind* affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their antient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, (though it was and is to be found in some other parts of the kingdom [f]) we may fairly conclude that this was a part of those liberties; agreeably to Mr Selden's opinion, that gavelkind before the Norman conquest was the general custom of the realm [g]. The distinguishing properties of this tenure are various: some of the principal are these; 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen [h]. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the "father to the bough, the son to the plough [i]." 3. In most places he had a power of devising lands by will, before the statute for that purpose was made [k]. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together [l]; which was indeed antiently the most

[b] *Pater cunctos filios adultos a se pellebat, praeter unum quem haeredem sui juris relinquebat.* (*Walsingh. Upodigm. Neustr.* c. 1.)

[c] Litt. §. 166.

[d] §. 167.

[e] Wright. 172.

[f] Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.

[g] *In toto regno, ante ducis adventum, frequens et usitata fuit: postea caeteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis solum integra et inviolata remansit.* (*Analect. l.* 2. *c.* 7.)

[h] Lamb. Peramb. 614.

[i] Lamb. 634.

[k] F. N. B. 198. Cro. Car. 561.

[l] Lit. §. 210.

usual

usual course of descent all over England [m], though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in it's nature certain [n]. Wherefore, by a charter of king John [o], Hubert archbishop of Canterbury was authorised to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's-service; and by statute 31 Hen. VIII. c. 3. for disgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage.* Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants: from all which I think it sufficiently clear, that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus distributed and distinguished the several species of tenure in free socage, I proceed next to shew that this also partakes very strongly of the feodal nature. Which may probably arise from it's antient Saxon original; since (as was before observed [p]) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that socage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own insignificancy: since I do not apprehend the number of socage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive

m Glanvil. *l.* 7. *c.* 3.
n Wright. 211.
o Spelm. *cod. vet. leg.* 355.
p pag. 48.

charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton [q], their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

HOWEVER this may be, the tokens of their feodal original will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. IN the first place, then, both were held of superior lords; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and the tenant.

2. BOTH were subject to the feodal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from it's nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty) and so continues to this day.

3. BOTH were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant [r]. Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton [s], that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencies [t].

4. THE tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daugh-

q c. 66.

r Litt. §. 117. 131.

s §. 130.

t *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (*Corvin. jus feod. l. 2. t. 7.*)

ter:

ter[u]: which were fixed by the ſtatute Weſtm. 1. c. 36. at 20 *s.* for every 20 *l. per annum* ſo held; as in knight-ſervice. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all aboliſhed by the ſtatute 12 Car. II.

5. RELIEF is due upon ſocage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5 *l.* or one quarter of the ſuppoſed value of the land; but a ſocage relief is one year's rent or render, payable by the tenant to the lord, be the ſame either great or ſmall[w]: and therefore Bracton[x] will not allow this to be properly a relief, but *quaedam praeſtatio loco relevii in recognitionem domini.* So too the ſtatute 28 Edw. I. c. 1. declares, that a free ſokeman ſhall give *no relief*, but ſhall double his rent after the death of his anceſtor, according to that which he hath uſed to pay his lord, and ſhall not be grieved above meaſure. Reliefs in knight-ſervice were only payable, if the heir at the death of his anceſtor was of full age: but in ſocage they were due even though the heir was under age, becauſe the lord has no wardſhip over him[y]. The ſtatute of Charles II reſerves the reliefs incident to ſocage tenures; and therefore, wherever lands in fee ſimple are holden by a rent, relief is ſtill due of common right upon the death of a tenant[z].

6. PRIMER ſeiſin was incident to the king's ſocage tenants *in capite*, as well as to thoſe by knight-ſervice[a]. But tenancy *in capite* as well as primer ſeiſins are, among the other feodal burthens, entirely aboliſhed by the ſtatute.

7. WARDSHIP is alſo incident to tenure in ſocage; but of a nature very different from that incident to knight-ſervice. For if the inheritance deſcend to an infant under fourteen, the wardſhip of him does not, nor ever did, belong to the lord of the fee; becauſe, in this tenure, no military or

[u] Co. Litt. 91.
[w] Litt. §. 126.
[x] *l.* 2. *c.* 37. §. 8.
[y] Litt. §. 127.
[z] 3 Lev. 145.
[a] Co. Litt. 77.

other perſonal ſervice being required, there was no occaſion for the lord to take the profits, in order to provide a proper ſubſtitute for his infant tenant: but his neareſt relation (to whom the inheritance cannot deſcend) ſhall be his guardian in ſocage, and have the cuſtody of his land and body till he arrives at the age of fourteen. The guardian muſt be ſuch a one, to whom the inheritance by no poſſibility can deſcend; as was fully explained, together with the reaſons for it, in the former book of theſe commentaries [b]. At fourteen this wardſhip in ſocage ceaſes; and the heir may ouſt the guardian, and call him to account for the rents and profits [c]: for at this age the law ſuppoſes him capable of chuſing a guardian for himſelf. It was in this particular, of wardſhip, as alſo in that of marriage, and in the certainty of the render or ſervice, that the ſocage tenures had ſo much the advantage of the military ones. But as the wardſhip ceaſed at fourteen, there was this diſadvantage attending it: that young heirs, being left at ſo tender an age to chuſe their own guardians till twenty-one, might make an improvident choice. Therefore, when almoſt all the lands in the kingdom were turned into ſocage tenures, the ſame ſtatute 12 Car. II. c. 24. enacted, that it ſhould be in the power of any father by will to appoint a guardian, till his child ſhould attain the age of twenty-one. And, if no ſuch appointment be made, the court of chancery will frequently interpoſe, and name a guardian, to prevent an infant heir from improvidently expoſing himſelf to ruin.

8. MARRIAGE, or the *valor maritagii*, was not in ſocage tenure any perquiſite or advantage to the guardian, but rather the reverſe. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unleſs he married him to advantage [d]. For, the law, in favour of infants, is always jealous of guardians, and therefore in this caſe it made them account, not only for what they *did*, but alſo for what they *might*, receive on the infant's behalf;

[b] vol. I. page 461.
[c] Litt. §. 123. Co. Litt. 89.
[d] Lit. §. 123.

lest

lest by some collusion the guardian should have received the value, and not brought it to account: but, the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry the first's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. FINES for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and sir Edward Coke's comment on them [e], speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the second.

10. ESCHEATS are equally incident to tenure in socage, as they were to tenure by knight-service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs [f].

THUS much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage.

THE other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivides into two classes, *pure* and *privileged* villenage: from whence have arisen two other species of our modern tenures.

[e] 1 Inst. 43. 2 Inst. 65, 66, 67. [f] Wright. 210.

III. FROM

III. From the tenure of pure villenage have ſprung our preſent *copyhold* tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which, it will be previouſly neceſſary to take a ſhort view of the original and nature of manors.

Manors are in ſubſtance as antient as the Saxon conſtitution, though perhaps differing a little, in ſome immaterial circumſtances, from thoſe that exiſt at this day [g]: juſt as we obſerved of feuds, that they were partly known to our anceſtors, even before the Norman conqueſt. A manor, *manerium, a manendo,* becauſe the uſual reſidence of the owner, ſeems to have been a diſtrict of ground, held by lords or great perſonages; who kept in their own hands ſo much land as was neceſſary for the uſe of their families, which were called *terrae dominicales* or *demeſne* lands; being occupied by the lord, or *dominus manerii,* and his ſervants. The other, or *tenemental,* lands they diſtributed among their tenants: which from the different modes of tenure were diſtinguiſhed by two different names. Firſt, *book-land,* or charter-land, which was held by deed under certain rents and free-ſervices, and in effect differed nothing from free ſocage lands [h]: and from hence have ariſen moſt of the freehold tenants who hold of particular manors, and owe ſuit and ſervice to the ſame. The other ſpecies was called *folk-land,* which was held by no aſſurance in writing, but diſtributed among the common folk or people at the pleaſure of the lord, and reſumed at his diſcretion; being indeed land held in villenage, which we ſhall preſently deſcribe more at large. The reſidue of the manor, being uncultivated, was termed the lord's waſte, and ſerved for public roads, and for common of paſture to the lord and his tenants. Manors were formerly called baronies, as they ſtill are lordſhips: and each lord or baron was empowered to hold a domeſtic court, called the court-baron, for redreſſing miſdemeſnors and nuſances within the manor, and for ſettling diſputes of property among the tènants. This court is an inſeparable ingredient of every manor; and if the number

[g] Co. Cop. §. 2 & 10. [h] Co. Cop. §. 3.

of

of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost.

IN the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an honour, not a manor, especially if it hath belonged to an antient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*; till the superior lords observed, that by this method of subinfeudation they lost all their feodal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of king John [1]) that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards the statute of Westm. 3. or *quia emptores*, 18 Edw. I. c. 1. which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Ed. II. c. 6. and of 34 Edw. III. c. 15. by which last all subinfeudations, previous to the reign of king

[1] See the Oxford editions of the charters.

Edward

Edward I, were confirmed: but all ſubſequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors exiſting at this day, muſt have exiſted as early as king Edward the firſt: for it is eſſential to a manor, that there be tenants who hold of the lord; and, by the operation of theſe ſtatutes, no tenant *in capite* ſince the acceſſion of that prince, and no tenant of a common lord ſince the ſtatute of *quia emptores*, could create any new tenants to hold of himſelf.

Now with regard to the folk-land, or eſtates held in villenage, this was a ſpecies of tenure neither ſtrictly feodal, Norman, or Saxon; but mixed and compounded of them all[k]: and which alſo, on account of the heriots that uſually attend it, may ſeem to have ſomewhat Daniſh in it's compoſition. Under the Saxon government there were, as ſir William Temple ſpeaks[l], a ſort of people in a condition of downright ſervitude, uſed and employed in the moſt ſervile works, and belonging, both they, their children, and effects, to the lord of the ſoil, like the reſt of the cattle or ſtock upon it. Theſe ſeem to have been thoſe who held what was called the folk-land, from which they were removable at the lord's pleaſure. On the arrival of the Normans here, it ſeems not improbable, that they, who were ſtrangers to any other than a feodal ſtate, might give ſome ſparks of enfranchiſement to ſuch wretched perſons as fell to their ſhare, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raiſed the tenant to a kind of eſtate ſuperior to downright ſlavery, but inferior to every other condition[m]. This they called villenage, and the tenants villeins, either from the word *vilis*, or elſe, as ſir Edward Coke tells us[n], *a villa*; becauſe they lived chiefly in villages, and were employed in ruſtic works of the moſt ſordid kind: reſembling the Spartan *helotes*, to whom alone the culture of the lands was conſigned; their rugged maſters, like our northern anceſtors, eſteeming war the only honourable employment of mankind.

k Wright, 215.

l Introd. Hiſt. Engl. 59.

m Wright, 217.

n 1 Inſt. 116.

THESE villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrable by deed from one owner to another[o]. They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices[p]: and their services were not only base, but uncertain both as to their time and quantity[q]. A villein, in short, was in much the same state with us, as Lord Molesworth[r] describes to be that of the boors in Denmark, and which Stiernhook[s] attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seise them to his own use, unless he contrived to dispose of them again before the lord had seised them; for the lord had then lost his opportunity[t].

IN many places also a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord[u]: and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property[w]. For the children of villeins were also in the same state of bondage with their pa-

o Litt. §. 181.

p *Ibid.* §. 172.

q *Ille qui tenet in villenagio faciet quicquid et praeceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton. *l.* 4. *tr.* 1. *c.* 28.)

r c. 8.

s *de jure Sueonum, l.* 2. *c.* 4.

t Litt. §. 177.

u Co. Litt. 140.

w Litt. §. 202.

rents;

rents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* [x]. In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because by another maxim of our law he is *nullius filius*; and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it [y]. The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein [z]; though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape, in case the lord violated them by force [a].

VILLEINS might be enfranchised by manumission, which is either express or implied: express; as where a man granted to the villein a deed of manumission [b]: implied; as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years [c]; for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him [d]; for, as the lord might have a short remedy against his villein, by seising his goods, (which was more than equivalent to any damages he could recover) the law, which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied

x Litt. §. 187.
y *Ibid.* §. 187, 188.
z *Ibid.* §. 189. 194.
a *Ibid.* §. 190.
b *Ibid.* §. 204.
c §. 204, 5, 6.
d §. 208.

manumission.

manumiſſion. But, in caſe the lord indicted him for felony, it was otherwiſe; for the lord could not inflict a capital puniſhment on his villein, without calling in the aſſiſtance of the law.

VILLEINS, by theſe and many other means, in proceſs of time gained conſiderable ground on their lords; and in particular ſtrengthened the tenure of their eſtates to that degree, that they came to have in them an intereſt in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their poſſeſſions without interruption, in a regular courſe of deſcent, the common law, of which cuſtom is the life, now gave them title to preſcribe againſt their lords; and, on performance of the ſame ſervices, to hold their lands, in ſpight of any determination of the lord's will. For, though in general they are ſtill ſaid to hold their eſtates at the will of the lord, yet it is ſuch a will as is agreeable to the cuſtom of the manor; which cuſtoms are preſerved and evidenced by the rolls of the ſeveral courts baron in which they are entered, or kept on foot by the conſtant immemorial uſage of the ſeveral manors in which the lands lie. And, as ſuch tenants had nothing to ſhew for their eſtates but theſe cuſtoms, and admiſſions in purſuance of them, entered on thoſe rolls, or the copies of ſuch entries witneſſed by the ſteward, they now began to be called *tenants by copy of court roll*, and their tenure itſelf a *copyhold*[e].

THUS copyhold tenures, as ſir Edward Coke obſerves[f], although very meanly deſcended, yet come of an ancient houſe; for, from what has been premiſed, it appears, that copyholders are in truth no other but villeins, who, by a long ſeries of immemorial encroachments on the lord, have at laſt eſtabliſhed a cuſtomary right to thoſe eſtates, which before were held abſolutely at the lord's will. Which af-

[e] F. N. B. 12.   [f] Cop. §. 32.

fords

fords a very ſubſtantial reaſon for the great variety of cuſtoms that prevail in different manors, with regard both to the deſcent of the eſtates, and the privileges belonging to the tenants. And theſe encroachments grew to be ſo univerſal, that when tenure in villenage was virtually aboliſhed, (though copyholds were reſerved) by the ſtatute of Charles II, there was hardly a pure villein left in the nation. For ſir Thomas Smith[g] teſtifies, that in all his time (and he was ſecretary to Edward VI) he never knew any villein in groſs throughout the realm; and the few villeins regardant that were then remaining were ſuch only as had belonged to biſhops, monaſteries, or other eccleſiaſtical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, "had in their confeſſions, and ſpecially in their extreme and "deadly ſickneſs, convinced the laity how dangerous a "practice it was, for one chriſtian man to hold another in "bondage: ſo that temporal men by little and little, by "reaſon of that terror in their conſciences, were glad to "manumit all their villeins. But the ſaid holy fathers, "with the abbots and priors, did not in like ſort by theirs; "for they alſo had a ſcruple in conſcience to empoveriſh and "deſpoil the church ſo much, as to manumit ſuch as were "bond to their churches, or to the manors which the church "had gotten; and ſo kept their villeins ſtill." By theſe ſeveral means the generality of villeins in the kingdom have long ago ſprouted up into copyholders: their perſons being enfranchiſed by manumiſſion or long acquieſcence; but their eſtates, in ſtrictneſs, remaining ſubject to the ſame ſervile conditions and forfeitures as before; though, in general, the villein ſervices are uſually commuted for a ſmall pecuniary quit-rent[h].

g Commonwealth. b. 3. c. 10.

h In ſome manors the copyholders were bound to perform the moſt ſervile offices, as to hedge and ditch the lord's grounds, to lop his trees, and reap his corn, and the like; the lord uſually finding them meat and drink, and ſometimes (as is ſtill the uſe in the highlands of Scotland) a minſtrel or piper for their diverſion. (*Rot. Maner. de Edgware Com. Midd.*) As in the kingdom of Whidah, on the ſlave coaſt of Africa, the people are bound to cut and carry in the king's corn from off his demeſne lands, and are attended by muſic during all the time of their labour. (Mod. Un. Hiſt. xvi. 429.)

As

As a farther consequence of what has been premised, we may collect these two main principles, which are held [i] to be the supporters of the copyhold tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

IN some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are stiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only; for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services, (as well in rents as otherwise) reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter [k], are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Ward-

[i] Co. Litt. 58.

[k] See ch. 28.

ſhip, in copyhold eſtates, partakes both of that in chivalry and that in ſocage. Like that in chivalry, the lord is the legal guardian; who uſually aſſigns ſome relation of the infant tenant to act in his ſtead: and he, like guardian in ſocage, is accountable to his ward for the profits. Of fines, ſome are in the nature of primer ſeiſins, due on the death of each tenant, others are mere fines for alienation of the lands; in ſome manors only one of theſe ſorts can be demanded, in ſome both, and in others neither. They are ſometimes arbitrary and at the will of the lord, ſometimes fixed by cuſtom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reaſonable* in their extent; otherwiſe they might amount to a diſherison of the eſtate. No fine therefore is allowed to be taken upon deſcents and alienations, (unleſs in particular circumſtances) of more than two years improved value of the eſtate [k]. From this inſtance we may judge of the favourable diſpoſition that the law of England (which is a law of liberty) hath always ſhewn to this ſpecies of tenants; by removing, as far as poſſible, every real badge of ſlavery from them, however ſome nominal ones may continue. It ſuffered cuſtom very early to get the better of the expreſs terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the cuſtom of the manor: and, where no cuſtom has been ſuffered to grow up to the prejudice of the lord, as in this caſe of arbitrary fines, the law itſelf interpoſes with an equitable moderation, and will not ſuffer the lord to extend his power ſo far, as to diſinherit the tenant.

THUS much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally deſcended from it.

IV. THERE is yet a fourth ſpecies of tenure, deſcribed by Bracton under the name ſometimes of *privileged* villenage, and ſometimes of *villein-ſocage*. This, he tells us [l], is ſuch as has been held of the kings of England from the conqueſt down-

[k] 2 Ch. Rep. 134.

[l] *l.* 4. *tr.* 1. *c.* 28.

downwards; that the tenants herein, "*villana faciunt servitia*, "*sed certa et determinata*;" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can: but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, *viz.* the tenure in *antient demesne*; to which, as partaking of the baseness of villenage in the nature of it's services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

ANTIENT demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and so appear to have been by the great survey in the exchequer called domesday-book [m]. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies [n], continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points [o]. Others were in great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them [p]; as, to try the right of their property in a peculiar court of their own, called a court of antient demesne, by a peculiar process denominated a writ of *right close* [q]; not to pay toll or taxes; not to contribute to the expences of knights of the shire; nor to be put on juries; and the like [r].

[m] F. N. B. 14. 16.
[n] c. 66.
[o] F. N. B. 228.
[p] 4 Inst. 269.
[q] F. N. B. 11.
[r] *Ibid.* 14.

THESE tenants therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold: for, notwithstanding their services were of a base and villenous original[s], yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*, says Bracton, *dicuntur liberi*." Britton also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes[t] to be "lands and tenements, "which are not held by knight-service, nor by grand serjeanty, "nor by petit, but by simple services, being, as it were, "lands enfranchised by the king or his predecessors from "their antient demesne." And the same name is also given them in Fleta[u]. Hence Fitzherbert observes[w], that no lands are antient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free-socage or socage of frank-tenure, and villein-socage or socage of antient demesne.

LANDS holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges beforementioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day; *viz.* that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds:

[s] Gilb. hist. of exch. 16. & 30.
[t] c. 66.
[u] *l.* 1. *c.* 8.
[w] N. B. 13.

yet

yet with this diſtinction [x], that, in the ſurrender of theſe lands in antient demeſne, it is not uſed to ſay "*to hold at* "*the will of the lord*" in their copies, but only, "*to hold* "*according to the cuſtom of the manor*."

THUS have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations theſe tenures have in proceſs of time undergone, from the Saxon aera to the 12 Car. II. all lay tenures are now in effect reduced to two ſpecies; *free* tenure in common ſocage, and *baſe* tenure by copy of court roll.

I MENTIONED *lay* tenures only; becauſe there is ſtill behind one other ſpecies of tenure, reſerved by the ſtatute of Charles II, which is of a *ſpiritual* nature, and called the tenure in frank-almoign.

V. TENURE in *frankalmoign*, *in libera eleemoſyna*, or free alms, is that, whereby a religious corporation, aggregate or ſole, holdeth lands of the donor to them and their ſucceſſors for ever [y]. The ſervice which they were bound to render for theſe lands was not certainly defined: but only in general to pray for the ſouls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other ſervices but this [z]) becauſe this divine ſervice was of a higher and more exalted nature [a]. This is the tenure, by which almoſt all the antient monaſteries and religious houſes held their lands; and by which the parochial clergy, and very many eccleſiaſtical and eleemoſynary foundations, hold them at this day [b]; the nature of the ſervice being upon the reformation altered, and made conformable to the purer doctrines

[x] Kitchin on courts. 194.
[y] Lit. §. 133.
[z] *Ibid.* 131.
[a] *Ibid.* 135.
[b] Bracton. *l.* 4. *tr.* 1. *c.* 28. §. 1.

of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions[c]: just as the Druids, among the antient Britons, had *omnium rerum immunitatem*[d]. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it[e]. Wherein it materially differs from what was called *tenure by divine service*: in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expresly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrein, without any complaint to the visitor[f]. All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I. none but the king can give lands to be holden by this tenure[g]. So that I only mention them, because *frankalmoign* is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

c Seld. *Jan.* 1. 42.

d Cæsar *de bell. Gal. l.* 6. *c.* 13.

e Litt. §. 136.

f *Ibid.* 137.

g *Ibid.* 140.

CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OF INHERITANCE.

THE next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements and hereditaments, signifies such interest as the tenant hath therein: so that if a man grants all *his estate* in Dale to A and his heirs, every thing that he can possibly grant shall pass thereby [a]. It is called in Latin *status*; it signifying the condition, or circumstance, in which the owner stands, with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement: secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and, thirdly, with regard to the *number* and *connections* of the tenants.

FIRST, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by it's duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of

[a] Co. Litt. 345.

estates, into such as are *freehold*, and such as are *less than freehold*.

AN estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton [b] to be "the *possession* of the soil "by a freeman." And St. Germyn [c] tells us, that "the "possession of the land is called in the law of England the "franktenement or freehold." Such estate therefore, and no other, as requires actual possession of the land, is legally speaking *freehold*: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton [d], that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

ESTATES of freehold (thus understood) are either estates *of inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

I. TENANT in fee-simple (or, as he is frequently stiled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever [e]; generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee *(feodum)* is the same with that of feud or fief, and in it's original sense it is

b c. 32.

c Dr. & Stud. b. 2. d. 22.

d §. 59.

e Litt. §. 1.

taken in contradistinction to *allodium* [f]; which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in it's highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore sir Henry Spelman [g] defines a feud or fee to be the right which the vasal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *propriety* of the soil always remaining in the lord. This allodial property no subject in England has [h]; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum dominium* [i]: but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration: for they cannot come to any man by either of those ways, unless accompanied with those feodal clogs, which were laid upon the first feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as sir Edward Coke expresses it [k], he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by these words; "he is seised thereof *in his demesne*, "*as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

f See pag. 45. 47.

g of feuds, c. 1.

h Co. Litt. 1.

i *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus. Ibid.*

k *Ibid.*

THIS

THIS is the primary ſenſe and acceptation of the word *fee*. But (as ſir Martin Wright very juſtly obſerves[l]) the doctrine, "that all lands are holden," having been for ſo many ages a fixed and undeniable axiom, our Engliſh lawyers do very rarely (of late years eſpecially) uſe the word *fee* in this it's primary original ſenſe, in contradiſtinction to *allodium* or abſolute property, with which they have no concern; but generally uſe it to expreſs the continuance or quantity of eſtate. A *fee* therefore, in general, ſignifies an eſtate of inheritance; being the higheſt and moſt extenſive intereſt that a man can have in a feud: and, when the term is uſed ſimply, without any other adjunct, or has the adjunct of *ſimple* annexed to it, (as a fee, or a fee ſimple) it is uſed in contradiſtinction to a fee conditional at the common law, or a fee-tail by the ſtatute; importing an abſolute inheritance, clear of any condition, limitation, or reſtrictions to particular heirs, but deſcendible to the heirs general, whether male or female, lineal or collateral. And in no other ſenſe than this is the king ſaid to be ſeiſed in fee, he being the feudatory of no man[m].

TAKING therefore *fee* for the future, unleſs where otherwiſe explained, in this it's ſecondary ſenſe, as a ſtate of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal[n]. But there is this diſtinction between the two ſpecies of hereditaments; that, of a corporeal inheritance a man ſhall be ſaid to be ſeiſed *in his demeſne, as of fee*; of an incorporeal one, he ſhall only be ſaid to be ſeiſed *as of fee*, and not in his demeſne[o]. For, as incorporeal hereditaments are in their nature collateral to, and iſſue out of, lands and houſes[p], their owner hath no property, *dominicum*, or demeſne, in the *thing* itſelf, but hath only ſomething derived out of it; reſembling the *ſervitutes*, or ſervices, of the civil law[q]. The *dominicum* or property is frequently

[l] of ten. 148.

[m] Co. Litt. 1.

[n] *Feodum eſt quod quis tenet ſibi et haeredibus ſuis, ſive ſit tenementum, ſive reditus, &c.* Flet. *l.* 5. *c.* 5. §. 7.

[o] Litt. §. 10.

[p] See page 20.

[q] *Servitus eſt jus, quo res mea alterius rei vel perſonae ſervit.* Ff. 8. 1. 1.

in

in one man, while the appendage or ſervice is in another. Thus Gaius may be ſeiſed *as of fee* of a way leading over the land, of which Titius is ſeiſed *in his demeſne as of fee.*

THE fee-ſimple or inheritance of lands and tenements is generally veſted and reſides in ſome perſon or other; though divers inferior eſtates may be carved out of it. As if one grants a leaſe for twenty-one years, or for one or two lives, the fee-ſimple remains veſted in him and his heirs; and after the determination of thoſe years or lives, the land reverts to the grantor or his heirs, who ſhall hold it again in fee-ſimple. Yet ſometimes the fee may be in *abeyance*, that is (as the word ſignifies) in expectation, remembrance, and contemplation in law; there being no perſon in *eſſe*, in whom it can veſt and abide: though the law conſiders it as always potentially exiſting, and ready to veſt whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it veſt in the heirs of Richard till his death, *nam nemo eſt haeres viventis*: it remains therefore in waiting or abeyance, during the life of Richard [r]. This is likewiſe always the caſe of a parſon of a church, who hath only an eſtate therein for the term of his life; and the inheritance remains in abeyance [s]. And not only the fee, but the freehold alſo, may be in abeyance; as, when a parſon dies, the freehold of his glebe is in abeyance, until a ſucceſſor be named, and then it veſts in the ſucceſſor [t].

THE word, heirs, is neceſſary in the grant or donation, in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his aſſigns for ever, this veſts in him but an eſtate for life [u]. This very great nicety about the inſertion of the word "heirs" in all feoffments and grants, in order to veſt a fee, is plainly a relic of the feodal ſtrictneſs: by which we may remember [w] it was required

r Co. Litt. 342.
s Litt. §. 646.
t *Ibid.* §. 6, 7.
u *Ibid.* §. 1.
w See pag. 56.

that

that the form of the donation should be punctually pursued; or that, as Crag[x] expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.*" And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions[y].

For, 1. It does not extend to devises by will; in which as they were introduced at the time when the feodal rigor was apace wearing out, a more liberal construction is allowed: and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs:" as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed[z]. 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided; but in creations by patent, which are *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in

x *l.* 1. *t.* 9. §. 17.
y Co. Litt. 9, 10.
z *Ibid.* 9.

a grant to a bishop, or other sole spiritual corporation, in *frankalmoign;* the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini;* and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one [a]. 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies [b]. But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.

II. WE are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts; 1. *Qualified*, or *base* fees: and 2. Fees *conditional*, so called at the common law; and afterwards fees-*tail*, in consequence of the statute *de donis*.

1. A BASE, or qualified fee, is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity [c], and, the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This

a See Vol. I. pag. 484.

b *Ibid.* 249.

c Co. Litt. 27.

estate

estate is a fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. A CONDITIONAL fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: "*donatio stricta et coarctata*[d]; *sicut certis haeredibus, quibusdam* "*a successione exclusis*:" as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs *male of his body*, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that, on failure of the heirs specified in the grant, the grant should be at an end, and the land return to it's antient proprietor[e]. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser, in our earliest Saxon laws[f].

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute,

d Flet. *l.* 3. *c.* 3. § 5.

e Plowd. 241.

f *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat. LL. Aelfred, c.* 37.

and

and wholly unconditional. So that, as ſoon as the grantee had any iſſue born, his eſtate was ſuppoſed to become abſolute, by the performance of the condition; at leaſt, for theſe three purpoſes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own iſſue, but alſo the donor of his intereſt in the reverſion [g]. 2. To ſubject him to forfeit it for treaſon: which he could not do, till iſſue born, longer than for his own life; leſt thereby the inheritance of the iſſue, and reverſion of the donor, might have been defeated [h]. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, ſo as to bind his iſſue [i]. And this was thought the more reaſonable, becauſe, by the birth of iſſue, the poſſibility of the donor's reverſion was rendered more diſtant and precarious: and *his* intereſt ſeems to have been the only one which the law, as it then ſtood, was ſolicitous to protect; without much regard to the right of ſucceſſion intended to be veſted in the iſſue. However, if the tenant did not in fact aliene the land, the courſe of deſcent was not altered by this performance of the condition; for if the iſſue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could deſcend to none but the heirs *of his body*, and therefore, in default of them, muſt have reverted to the donor. For which reaſon, in order to ſubject the lands to the ordinary courſe of deſcent, the donees of theſe conditional fee-ſimples took care to aliene as ſoon as they had performed the condition by having iſſue; and afterwards re-purchaſed the lands, which gave them a fee-ſimple abſolute, that would deſcend to the heirs general, according to the courſe of the common law. And thus ſtood the old law with regard to conditional fees: which things, ſays ſir Edward Coke [k], though they ſeem antient, are yet neceſſary to be known; as well for the declaring how the common law ſtood in ſuch caſes, as for the ſake of annuities, and ſuch like inheritances, as are not within the ſtatutes of entail, and therefore remain as at the common law.

[g] Co. Litt. 19. 2 Inſt. 233.
[h] Co. Litt. *ibid.* 2 Inſt. 234.
[i] Co. Litt. 19.
[k] 1 Inſt. 19.

THE

THE inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtile finesse of construction, (for such it undoubtedly was) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second [l], (commonly called the statute *de donis conditionabilis*) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the antient feodal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

UPON the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail* [m]; and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion [n]. And hence it is that Littleton tells us [o], that tenant in fee-tail is by virtue of the statute of Westminster the second.

HAVING thus shewn the *original* of estates tail, I now proceed to consider, *what things* may, or may not, be entailed

[l] 13 Edw. I. c. 1.

[m] The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists; (See Crag. *l.* 1. *t.* 10. §. 24, 25.) among whom it signified any mutilated or truncated inheritance, from which the heirs general were *cut* off; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. *Gloss.* 531.)

[n] 2 Inst. 335.

[o] §. 13.

under the ſtatute *de donis*. *Tenements* is the only word uſed in the ſtatute: and this ſir Edward Coke [p] expounds to comprehend all corporeal hereditaments whatſoever; and alſo all incorporeal hereditaments which ſavour of the realty, that is, which iſſue out of corporeal ones, or which concern, or are annexed to, or may be exerciſed within the ſame; as, rents, eſtovers, commons, and the like: Alſo offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed [q]. But mere perſonal chattels, which ſavour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to ſuch perſonal chattels; nor an annuity, which charges only the perſon, and not the lands, of the grantor. But in theſe laſt, if granted to a man and the heirs of his body, the grantee hath ſtill a fee conditional at common law, as before the ſtatute; and by his alienation (after iſſue born) may bar the heir or reverſioner [r]. An eſtate to a man and his heirs for another's life cannot be entailed [s]: for this is ſtrictly no eſtate of inheritance, (as will appear hereafter) and therefore not within the ſtatute *de donis*. Neither can a copyhold eſtate be entailed by virtue of the *ſtatute*; for that would tend to encroach upon and reſtrain the will of the lord: but, by the *ſpecial cuſtom* of the manor, a copyhold may be limited to the heirs of the body [t]; for here the cuſtom aſcertains and interprets the lord's will.

NEXT, as to the ſeveral *ſpecies* of eſtates-tail, and how they are reſpectively created. Eſtates-tail are either *general* or *ſpecial*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, becauſe, how often ſoever ſuch donee in tail be married, his iſſue in general by all and every ſuch marriage is, in ſucceſſive order, capable of inheriting the eſtate-tail, *per formam doni* [u]. Tenant in tail-ſpecial is where the gift is reſtrained to certain heirs of the donee's body, and does not go to all of them in general. And this may hap-

[p] 1 Inſt. 19, 20.
[q] 7 Rep. 33.
[r] Co. Litt. 19, 20.
[s] 2 Vern. 225.
[t] 3 Rep. 8.
[u] Litt. §. 14, 15.

pen ſeveral ways [w]. I ſhall inſtance in only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten:* here no iſſue can inherit, but ſuch ſpecial iſſue as is engendered between them two; not ſuch as the huſband may have by another wife: and therefore it is called ſpecial tail. And here we may obſerve, that the words of inheritance (to him and his *heirs*) give him an eſtate in fee; but they being heirs *to be by him begotten,* this makes it a fee-tail; and the perſon being alſo limited, on whom ſuch heirs ſhall be begotten, (viz. *Mary his preſent wife*) this makes it a fee-tail ſpecial.

ESTATES, in general and ſpecial tail, are farther diverſified by the diſtinction of ſexes in ſuch entails; for both of them may either be in tail *male* or tail *female.* As if lands be given to a man, and his *heirs male of his body begotten,* this is an eſtate in tail male general; but if to a man and the heirs *female of his body on his preſent wife begotten,* this is an eſtate in tail female ſpecial. And, in caſe of an entail male, the heirs female ſhall never inherit, nor any derived from them; nor *e converſo,* the heirs male, in caſe of a gift in tail female [x]. Thus, if the donee in tail male hath a daughter, who dies leaving a ſon, ſuch grandſon in this caſe cannot inherit the eſtate-tail; for he cannot deduce his deſcent wholly by heirs male [y]. And as the heir male muſt convey his deſcent wholly by males, ſo muſt the heir female wholly by females. And therefore if a man hath two eſtates-tail, the one in tail male, the other in tail female; and he hath iſſue a daughter, which daughter hath iſſue a ſon; this grandſon can ſucceed to neither of the eſtates: for he cannot convey his deſcent wholly either in the male or female line [z].

As the word *heirs* is neceſſary to create a fee, ſo in farther limitation of the ſtrictneſs of the feodal donation, the word *body,* or ſome other words of procreation, are neceſſary to make it a fee-tail, and aſcertain to what heirs in particular

w Litt. §. 16. 26, 27, 28, 29.
x *Ibid.* §. 21, 22.
y *Ibid.* §. 24.
z Co. Litt. 25.

the

the fee is limited If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs [a]. So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue [b]. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression [c].

THERE is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libro maritagio*, or *frankmarriage*. These are defined [d] to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee [e].

THE *incidents* to a tenancy in tail, under the statute Westm. 2. are chiefly these [f]. 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling

[a] Co. Litt. 20.
[b] Litt. §. 31. Co. Litt. 27.
[c] Co. Litt. 9. 27.
[d] Litt. §. 17.
[e] *Ibid.* §. 19, 20.
[f] Co. Litt. 224.

down houſes, or the like, without being impeached, or called to account, for the ſame. 2. That the wife of the tenant in tail ſhall have her *dower*, or thirds, of the eſtate-tail. 3. That the huſband of a female tenant in tail may be tenant by the *curteſy* of the eſtate-tail. 4. That an eſtate-tail may be *barred*, or deſtroyed by a fine, by a common recovery, or by lineal warranty deſcending with aſſets to the heir. All which will hereafter be explained at large.

THUS much for the nature of eſtates-tail: the eſtabliſhment of which family law (as it is properly ſtiled by Pigott [g]) occaſioned infinite difficulties and diſputes [h]. Children grew diſobedient when they knew they could not be ſet aſide: farmers were ouſted of their leaſes made by tenants in tail; for, if ſuch leaſes had been valid, then under colour of long leaſes the iſſue might have been virtually diſinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his eſtate with their payment, he might alſo have defeated his iſſue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchaſers of the lands they had fairly bought; of ſuits in conſequence of which our antient books are full: and treaſons were encouraged; as eſtates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were juſtly branded, as the ſource of new contentions, and miſchiefs unknown to the common law; and almoſt univerſally conſidered as the common grievance of the realm [i]. But as the nobility were always fond of this ſtatute, becauſe it preſerved their family eſtates from forfeiture, there was little hope of procuring a repeal by the legiſlature; and therefore, by the connivance of an active and politic prince, a method was deviſed to evade it.

ABOUT two hundred years intervened between the making of the ſtatute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV; which were then openly declared by the judges to be a ſuffi-

g Com. Recov. 5.
h 1 Rep. 131.
i Co. Litt. 19. Moor. 156. 10 Rep. 38.

cient

cient bar of an estate-tail [k]. For though the courts had, so long before as the reign of Edward III, very frequently hinted their opinion that a bar might be effected upon these principles [l], yet it never was carried into execution; till Edward IV observing [m] (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court [n]: wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof. What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and, that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament [o] have by a sidewind countenanced and established them.

THIS expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently re-

[k] 1 Rep. 131. 6 Rep. 40.

[l] 10 Rep. 37, 38.

[m] Pigott. 8.

[n] Year book. 12 Edw. IV. 14. 19. Fitzh. *Abr. tit faux recov.* 20 Bro. *Abr. ibid.* 30. *tit. recov. in value.* 19. *tit. taile* 36.

[o] 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.

settled in a similar manner to suit the convenience of families, had address enough to procure a statute [p], whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

THE next attack which they suffered in order of time, was by the statute 32 Hen. VIII. c. 28. whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines [q], by the statute 32 Hen. VIII. c. 36. which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons, claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expresly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had against tenants in tail, where the estate was created by the

[p] 26 Hen. VIII. c. 13.

[q] 4 Hen. VII. c. 24.

crown,

crown [r], and the remainder or reverſion continues ſtill in the crown, ſhall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with reſpect to ordinary eſtates-tail, where the royal prerogative is not concerned.

LASTLY, by a ſtatute of the ſucceeding year [s], all eſtates-tail are rendered liable to be charged for payment of debts due to the king by record or ſpecial contract; as ſince, by the bankrupt laws [t], they are alſo ſubjected to be ſold for the debts contracted by a bankrupt. And, by the conſtruction put on the ſtatute 43 Eliz. c. 4. an appointment [u] by tenant in tail of the lands entailed, to a charitable uſe, is good without fine or recovery.

ESTATES-TAIL, being thus by degrees unfettered, are now reduced again to almoſt the ſame ſtate, even before iſſue born, as conditional fees were in at common law, after the condition was performed, by the birth of iſſue. For, firſt, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the intereſt as well of his own iſſue, though unborn, as alſo of the reverſioner, except in the caſe of the crown: ſecondly, he is now liable to forfeit them for high treaſon: and, laſtly, he may charge them with reaſonable leaſes, and alſo with ſuch of his debts as are due to the crown on ſpecialties, or have been contracted with his fellow-ſubjects in a courſe of extenſive commerce.

r Co. Litt. 372.
s 33 Hen. VIII. c. 39. §. 75.
t Stat. 21 Jac. I. c. 19.
u 2 Vern. 453. Chan. Prec. 16.

CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold, as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law [a]. We will consider them both in their order.

I. ESTATES for life, expressly created by deed or grant, (which alone are properly conventional) are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is stiled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur auter vie* [b]. These estates for life are, like inheritances, of a feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen [c]) was not in it's original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

[a] Wright. 190.
[b] Litt. §. 56.
[c] pag. 55.

ESTATES

ESTATES for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life [d]. For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee* [e]; in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor [f], unless in the case of the king.

SUCH estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone [g]. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law [h]: for which reason in conveyances the grant is usually made "for the term of a man's *natural* life;" which can only determine by his *natural* death [i].

d Co. Litt. 42.
e *Ibid.*
f *Ibid.* 36.
g Co. Litt. 42. 3 Rep. 20.
h 2 Rep. 48.
i See Vol. I. pag. 132.

THE

THE *incidents* to an eſtate for life, are principally the following; which are applicable not only to that ſpecies of tenants for life, which are expreſsly created by deed; but alſo to thoſe, which are created by act and operation of law.

1. EVERY tenant for life, unleſs reſtrained by covenant or agreement, may of common right take upon the land demiſed to him reaſonable *eſtovers* [k] or *botes* [l]. For he hath a right to the full enjoyment and uſe of the land, and all it's profits, during his eſtate therein. But he is not permitted to cut down timber or do other waſte upon the premiſes [m]: for the deſtruction of ſuch things, as are not the temporary profits of the tenement, is not neceſſary for the tenant's complete enjoyment of his eſtate; but tends to the permanent and laſting loſs of the perſon entitled to the inheritance.

2. TENANT for life, or his repreſentatives, ſhall not be prejudiced by any ſudden determination of his eſtate, becauſe ſuch a determination is contingent and uncertain [n]. Therefore if a tenant for his own life ſows the lands, and dies before harveſt, his executors ſhall have the *emblements*, or profits of the crop: for the eſtate was determined by the *act of God;* and it is a maxim in the law, that *actus Dei nemini facit injuriam.* The repreſentatives therefore of the tenant for life ſhall have the emblements, to compenſate for the labour and expence of tilling, manuring, and ſowing the lands; and alſo for the encouragement of huſbandry, which being a public benefit, tending to the encreaſe and plenty of proviſions, ought to have the utmoſt ſecurity and privilege that the law can give it. Wherefore by the feodal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reverſion, was alſo entitled to the profits of the whole year; but, if he died between the beginning of March and the end

k See pag. 35.

l Co. Litt. 41.

m *Ibid.* 53.

n *Ibid.* 55.

of

of Auguſt, the heirs of the tenant received the whole [o]. From hence our law of emblements ſeems to have been derived, but with very conſiderable improvements. So it is alſo, if a man be tenant for the life of another, and *ceſtuy que vie*, or he on whoſe life the land is held, dies after the corn ſown, the tenant *pur auter vie* ſhall have the emblements. The ſame is alſo the rule, if a life-eſtate be determined by the *act of law*. Therefore, if a leaſe be made to huſband and wife during coverture, (which gives them a determinable eſtate for life) and the huſband ſows the land, and afterwards they are divorced *a vinculo matrimonii*, the huſband ſhall have the emblements in this caſe; for the ſentence of divorce is the act of law [p]. But if an eſtate for life be determined by the tenant's *own act*, (as, by forfeiture for waſte committed; or, if a tenant during widowhood thinks proper to marry) in theſe, and ſimilar caſes, the tenants, having thus determined the eſtate by their own acts, ſhall not be entitled to take the emblements [q]. The doctrine of emblements extends not only to corn ſown, but to roots planted, or other annual artificial profit, but it is otherwiſe of fruit-trees, graſs, and the like; which are not planted annually at the expenſe and labour of the tenant, but are either a permanent, or natural, profit of the earth [r]. For when a man plants a tree, he cannot be preſumed to plant it in contemplation of any preſent profit; but merely with a proſpect of it's being uſeful to himſelf in future, and to future ſucceſſions of tenants. The advantages alſo of emblements are particularly extended to the parochial clergy by the ſtatute 28 Hen. VIII. c. 11. For all perſons, who are preſented to any eccleſiaſtical benefice, or to any civil office, are conſidered as tenants for their own lives, unleſs the contrary be expreſſed in the form of donation.

3. A THIRD incident to eſtates for life relates to the under-tenants or leſſees. For they have the ſame, nay greater indulgences than their leſſors, the original tenants for life. The ſame; for the law of eſtovers and emblements, with re-

o *Feud. l.* 2. *t.* 28.
p 5 Rep. 116.
q Co. Litt. 55.
r Co. Litt. 55, 56. 1 Roll. Abr. 728.

gard

gard to the tenant for life, is alſo law with regard to his under-tenant, who repreſents him and ſtands in his place [s]: and greater; for in thoſe caſes where tenant for life ſhall not have the emblements, becauſe the eſtate determines by his own act, the exception ſhall not reach his leſſee who is a third perſon. As in the caſe of a woman who holds *durante viduitate:* her taking huſband is her own act, and therefore deprives her of the emblements: but if ſhe leaſes her eſtate to an under-tenant, who ſows the land, and ſhe then marries, this her act ſhall not deprive the tenant of his emblements, who is a ſtranger and could not prevent her [t]. The leſſees of tenants for life had alſo at the common law another moſt unreaſonable advantage; for, at the death of their leſſors the tenants for life, theſe under-tenants might if they pleaſed quit the premiſes, and pay no rent to any body for the occupation of the land ſince the laſt quarter day, or other day aſſigned for payment of rent [u]. To remedy which it is now enacted [v], that the executors or adminiſtrators of tenant for life, on whoſe death any leaſe determined, ſhall recover of the leſſee a ratable proportion of rent, from the laſt day of payment to the death of ſuch leſſor.

II. THE next eſtate for life is of the legal kind, as contradiſtinguiſhed from conventional; *viz.* that of tenant *in tail after poſſibility of iſſue extinct.* This happens, where one is tenant in ſpecial tail, and a perſon, from whoſe body the iſſue was to ſpring, dies without iſſue; or, having left iſſue, that iſſue becomes extinct: in either of theſe caſes the ſurviving tenant in ſpecial tail becomes tenant in tail after poſſibility of iſſue extinct. As, where one has an eſtate to him and his heirs on the body of his preſent wife to be begotten, and the wife dies without iſſue [w]: in this caſe the man has an eſtate-tail, which cannot poſſibly deſcend to any one; and therefore the law makes uſe of this long periphraſis, as abſolutely neceſſary to give an adequate idea of his eſtate. For if it had called him barely *tenant in fee-tail ſpecial*, that

[s] Co. Litt. 55.
[t] Cro. Eliz. 461. 1 Roll. Abr. 727.
[u] 10 Rep. 127.
[v] Stat. 11 Geo. II. c. 19. §. 15.
[w] Litt. §. 32.

would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee [x], for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been stiled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant *in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

THIS estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them [y]. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old [z].

THIS estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tentant in tail; as, not to be punishable for waste, *&c* [a]: or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he alienes it in fee-simple [b]: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest,

[x] 1 Roll. Rep. 184. 11 Rep. 80.
[y] Co. Litt. 28.
[z] Litt. §. 34. Co. Litt. 28.
[a] Co. Litt. 27.
[b] *Ibid.* 28.

till all poffibility of iffue be extinct. But, in general, the law looks upon this eftate as equivalent to an eftate for life only; and, as fuch, will permit this tenant to exchange his eftate with a tenant for life; which exchange can only be made, as we fhall fee hereafter, of eftates that are equal in their nature.

III. TENANT *by the curtefy of England*, is where a man marries a woman feifed of an eftate of inheritance, that is, of lands and tenements in fee-fimple or fee-tail; and has by her iffue, born alive, which was capable of inheriting her eftate. In this cafe, he fhall, on the death of his wife, hold the lands for his life, as tenant by the curtefy of England [c].

THIS eftate, according to Littleton, has it's denomination, becaufe it is ufed within the realm of England only; and it is faid in the mirrour [d] to have been introduced by king Henry the firft; but it appears alfo to have been the eftablifhed law of Scotland, wherein it was called *curialitas* [e], fo that probably our word *curtefy* was underftood to fignify rather an attendance upon the lord's *court* or *curtis*, (that is, being his vafal or tenant) than to denote any peculiar favour belonging to this ifland. And therefore it is laid down [f] that by having iffue, the hufband fhall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before iffue had, they muft both have done it together. It is likewife ufed in Ireland, by virtue of an ordinance of king Henry III [g]. It alfo appears [h] to have obtained in Normandy; and was likewife ufed among the antient Almains or Germans [i]. And yet it is not generally apprehended to have been a confequence of feodal tenure [k], though I think fome fubftantial feodal reafons may be given for it's introduction. For, if a woman feifed of lands hath iffue by her hufband, and dies, the hufband is the natural guardian of the child, and as fuch is in reafon entitled to the profits of the lands in order to maintain it: for

c Litt. §. 35. 52.
d c. 1. §. 3.
e Crag. *l.* 2. *t.* 19. §. 4.
f Litt. §. 90. Co. Litt. 30. 67.
g *Pat.* 11 *H. III. m.* 30. in 2 Bac. Abr. 659.
h *Grand Couftum.* c. 119.
i Lindenbrog. *LL. Alman. t.* 92.
k Wright. 294.

which reaſon the heir apparent of a tenant by the curteſy could not be in ward to the lord of the fee, during the life of ſuch tenant [l]. As ſoon therefore as any child was born, the father began to have a permanent intereſt in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curteſy *initiate;* and this eſtate being once veſted in him by the birth of the child, was not ſuffered to determine by the ſubſequent death or coming of age of the infant.

THERE are four requiſites neceſſary to make a tenancy by the curteſy; marriage, ſeiſin of the wife, iſſue, and death of the wife [m]. 1. The marriage muſt be canonical and legal. 2. The ſeiſin of the wife muſt be an actual ſeiſin, or poſſeſſion of the lands; not a bare right to poſſeſs, which is a ſeiſin in law, but an actual poſſeſſion, which is a ſeiſin in deed. And therefore a man ſhall not be tenant by the curteſy of a remainder or reverſion. But of ſome incorporeal hereditaments a man may be tenant by the curteſy, though there have been no actual ſeiſin of the wife: as in caſe of an advowſon, where the church has not become void in the life-time of the wife; which a man may hold by the curteſy, becauſe it is impoſſible ever to have actual ſeiſin of it, and *impotentia excuſat legem* [n]. If the wife be an idiot, the huſband ſhall not be tenant by the curteſy of her lands; for the king by prerogative is entitled to them, the inſtant ſhe herſelf has any title: and ſince ſhe could never be rightfully ſeiſed of the lands, and the huſband's title depends entirely upon her ſeiſin, the huſband can have no title as tenant by the curteſy [o]. 3. The iſſue muſt be born alive. Some have had a notion that it muſt be heard to cry; but that is a miſtake. Crying indeed is the *ſtrongeſt* evidence of it's being born alive; but it is not the *only* evidence [p]. The iſſue alſo muſt be born during the life of the mother; for, if the mother dies in labour, and the Caeſarean operation is performed, the huſband in this caſe ſhall not be tenant by the

[l] F. N. B. 143.
[m] Co. Litt. 30.
[n] *Ibid.* 29.
[o] Co. Litt 30. Plowd. 263.
[p] Dyer. 25. 8 Rep. 34.

curteſy:

curtesy: because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him [q]. In gavelkind lands, a husband may be tenant by the curtesy without having any issue [r]. But in general there must be issue born; and such issue as is also capable of inheriting the mother's estate [s]. Therefore if a woman be tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male [t]. And this seems to be the principal reason, why the husband canot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy [u]. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy [w]. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy *initiate* [x], and may do many acts to charge the lands: but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy [y].

q Co. Litt. 29.
r *Ibid.* 30.
s Litt. §. 56.
t Co. Litt. 29.
u *Ibid.* 40.
w *Ibid.* 29.
x *Ibid.* 30.
y *Ibid.*

II. TENANT

IV. TENANT in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life [z].

DOWER is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*: which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in it's original state, had nothing that bore a resemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of king Edmond [a], the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands; with a proviso that she remained chaste and unmarried [b]; as is usual also in copyhold dowers, or free bench. Yet some [c] have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feodal reason for it's invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia* [d], and *dotalitium*) by the emperor Frederick the second [e]; who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Danish ladies, who sold all their

[z] Litt. §. 36.
[a] Wilk. 75.
[b] Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*. 70.
[c] Wright. 192.
[d] Crag. *l.* 2. *t.* 22. §. 9.
[e] *Ibid.*

jewels to ranſom him when taken priſoner by the Vandals[f]. However this be, the reaſon, which our law gives for adopting it, is a very plain and ſenſible one; for the ſuſtenance of the wife, and the nurture and education of the younger children[g].

IN treating of this eſtate, let us, firſt, conſider, *who* may be endowed; ſecondly, of *what* ſhe may be endowed; thirdly, the manner *how* ſhe ſhall be endowed; and fourthly, how dower may be *barred* or prevented.

1. WHO may be endowed. She muſt be the actual wife of the party at the time of his deceaſe. If ſhe be divorced *a vinculo matrimonii*, ſhe ſhall not be endowed; for *ubi nullum matrimonium, ibi nulla dos*[h]. But a divorce *a menſa et thoro* only doth not deſtroy the dower[i]; no, not even for adultery itſelf by the common law[k]. Yet now by the ſtatute Weſtm. 2.[l] if a woman voluntarily leaves (which the law calls eloping from) her huſband, and lives with an adulterer, ſhe ſhall loſe her dower, unleſs her huſband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the huſband of an idiot could not be tenant by the curteſy[m]: but as it ſeems to be at preſent agreed, upon principles of ſound ſenſe and reaſon, that an idiot cannot marry, being incapable of conſenting to any contract, this doctrine cannot now take place. By the antient law the wife of a perſon attainted of treaſon or felony could not be endowed; to the intent, ſays Staunforde[n], that if the love of a man's own life cannot reſtrain him from ſuch atrocious acts, the love of his wife and children may: though Britton[o] gives it another turn; *viz.* that it is preſumed the wife was privy to her huſband's crime. However, the ſtatute 1 Edw. VI. c. 12. abated the rigour of the common law

f Mod. Un. Hiſt. xxxii. 91.

g Bract. *l.* 2. *c.* 39. Co. Litt. 30.

h Bract. *l.* 2. *c.* 39. §. 4.

i Co. Litt. 32.

k Yet, among the antient Goths, an adultereſs was puniſhed by the loſs of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3. *c.* 2.)

l 13 Edw. I. c. 34.

m Co. Litt. 31.

n P. C. b. 3. c. 3.

o c. 110.

in this particular, and allowed the wife her dower. But a subsequent statute [p] revived this severity against the widows of traitors, who are now barred of their dower, (except in the case of certain modern treasons relating to the coin [q]) but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands [r]. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed [s]: though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere* [t]."

2. WE are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir [u]. Therefore if a man, seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them [v]. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed [w]. The seisin of the husband, for a transitory instant

p 5 & 6 Edw. 6. c. 11.

q Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

r Co. Litt. 31.

s Litt. §. 36.

t *l.* 2. *c.* 9. §. 3.

u Litt. §. 36. 53.

v *Ibid.* §. 53.

w Co. Litt. 31.

only, when the ſame act which gives him the eſtate conveys it alſo out of him again, (as where by a fine, land is granted to a man, and he immediately renders it back by the ſame fine) ſuch a ſeiſin will not entitle the wife to dower [x]: for the land was merely *in tranſitu*, and never reſted in the huſband; the grant and render being one continued act. But, if the land abides in him for the interval of but a ſingle moment, it ſeems that the wife ſhall be endowed thereof [y]. And, in ſhort, a widow may be endowed of all her huſband's lands, tenements, and hereditaments, corporeal or incorporeal, under the reſtrictions before-mentioned; unleſs there be ſome ſpecial reaſon to the contrary. Thus, a woman ſhall not be endowed of a caſtle, built for defence of the realm [z]: nor of a common without ſtint; for, as the heir would then have one portion of this common, and the widow another, and both without ſtint, the common would be doubly ſtocked [a]. Copyhold eſtates are alſo not liable to dower, being only eſtates at the lord's will; unleſs by the ſpecial cuſtom of the manor, in which caſe it is uſually called the widow's free-bench [b]. But, where dower is allowable, it matters not though the huſband aliene the lands during the coverture; for he alienes them liable to dower [c].

3. NEXT, as to the manner in which a woman is to be endowed. There are now ſubſiſting four ſpecies of dower; the fifth, mentioned by Littleton [d], *de la plus belle*, having been aboliſhed together with the military tenures, of which it was a conſequence. 1. Dower by the *common law*; or that which is before deſcribed. 2. Dower by particular *cuſtom* [e]; as that the wife ſhould have half the huſband's lands, or in ſome places the whole, and in ſome only a quarter. 3. Dower *ad oſtium eccleſiae* [f]: which is where tenant in fee-

x Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

y This doctrine was extended very far by a jury in Wales, where the father and ſon were both hanged in one cart, but the ſon was ſuppoſed to have ſurvived the father, by appearing to ſtruggle longeſt; whereby he became ſeiſed of an eſtate in fee by ſurvivorſhip, in conſequence of which ſeiſin his widow had a verdict for her dower. (Cro. Eliz. 503.)

z Co. Litt. 31. 3 Lev. 401.

a Co. Litt. 32. 1 Jon. 315.

b 4 Rep. 22.

c Co. Litt. 32.

d §. 48, 49.

e Litt. §. 37.

f *Ibid.* §. 39.

ſimple

ſimple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (ſir Edward Coke in his tranſlation of Littleton adds) troth plighted between them, doth endow his wife with the whole, or ſuch quantity as he ſhall pleaſe, of his lands; at the ſame time ſpecifying and aſcertaining the ſame: on which the wife, after her huſband's death, may enter without farther ceremony. 4. Dower *ex aſſenſu patris* [g]; which is only a ſpecies of dower *ad oſtium eccleſiae*, made when the huſband's father is alive, and the ſon by his conſent, expreſsly given, endows his wife with parcel of his father's lands. In either of theſe caſes, they muſt (to prevent frauds) be made [h] *in facie eccleſiae et ad oſtium eccleſiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandeſtina fuere conjugia.*

IT is curious to obſerve the ſeveral revolutions which the doctrine of dower has undergone, ſince it's introduction into England. It ſeems firſt to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the huſband's lands, but forfeitable by incontinency or a ſecond marriage. By the famous charter of Henry I, this condition, of widowhood and chaſtity, was only required in caſe the huſband left any iſſue [i]: and afterwards we hear no more of it. Under Henry the ſecond, according to Glanvil [k], the dower *ad oſtium eccleſiae* was the moſt uſual ſpecies of dower; and here, as well as in Normandy [l], it was binding upon the wife, if by her conſented to at the time of marriage. Neither, in thoſe days of feodal rigor, was the huſband allowed to endow her *ad oſtium eccleſiae* with more than the third part of the lands whereof he then was ſeiſed, though he might endow her with leſs; leſt by ſuch liberal endowments the lord ſhould be defrauded of his wardſhips and other feodal profits [m]. But if no ſpecific dotation was made

g Litt. §. 40.

h Bracton. *l.* 2. *c.* 49. §. 4.

i *Si mortuo viro uxor ejus remanſerit, et ſine liberis fuerit, dotem ſuam habebit;—ſi vero uxor cum liberis remanſerit, dotem quidem habebit, dum corpus ſuum legitime ſervaverit.* (*Cart. Hen. I. A. D.* 1101. Introd. to great charter. *edit. Oxon.* pag. iv.)

k *l.* 6. *c.* 1. & 2.

l *Gr. Couſtum. c.* 101.

m Bract. *l.* 2. *c.* 39. §. 6.

at the church porch, then she was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions [n]: and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower [o] in lands which he afterwards acquired [p]. In king John's *magna carta*, and the first charter of Henry III [q], no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his life-time [r]: yet, in case of a specific endowment of less *ad ostium ecclesiae*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III and Edward I [s]. In Henry IV's time it was denied to be law, that a woman can be endowed of her husband's goods and chattels [t]: and, under Edward IV, Littleton lays it down ex-

[n] *De questu suo.* (Glanv. *ib.*)—*de terris acquisitis et acquirendis.* (Bract. *ib.*)

[o] Glanv. *c.* 2.

[p] When special endowments were made *ad ostium ecclesiae*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. *ibid.*) and therefore in the old York ritual (Seld. *Ux. Hebr. l.* 2.) *c.* 27.) there is, at this part of the matrimonial service, the following rubric; "*sacerdos interroget dotem mulieris; et si* "*terra ei in dotem detur, tunc dicatur* "*psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*; Bract. *ibid.*) the husband seems to have said, "with all my "lands and tenements I thee endow;" and then they all become liable to her dower. When he endowed her with personalty only, he used to say, "with "all my worldly goods (or, as the Salisbury ritual has it, *with all my* "*worldly chattel*) I thee endow;" which intitled the wife to her thirds, or *pars rationabilis*, of his personal estate, which is provided for by *magna carta*, *cap.* 26. and will be farther treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

[q] *A. D.* 1216. *c.* 7. *edit. Oxon.*

[r] *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiae. c.* 7. (*Ibid.*)

[s] Bract. *ubi supr.* Britton. *c.* 101, 102. Flet. *l.* 5. *c.* 23. §. 11, 12.

[t] *P.* 7 *Hen. IV.* 13, 14.

presſly, that a woman may be endowed *ad oſtium eccleſiae* with more than a third part [u]; and ſhall have her election, after her huſband's death, to accept ſuch dower or refuſe it, and betake herſelf to her dower at common law [w]. Which ſtate of uncertainty was probably the reaſon, that theſe ſpecific dowers, *ad oſtium eccleſiae* and *ex aſſenſu patris*, have ſince fallen into total diſuſe.

I PROCEED, therefore, to conſider the method of endowment, or aſſigning dower, by the common law, which is now the only uſual ſpecies. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could ſhe marry again without his licence; leſt ſhe ſhould contract herſelf, and ſo convey part of the feud, to the lord's enemy [x]. This licence the lords took care to be well paid for; and, as it ſeems, would ſometimes force the dowager to a ſecond marriage, in order to gain the fine. But, to remedy theſe oppreſſions, it was provided, firſt by the charter of Henry I [y], and afterwards by *magna carta* [z], that the widow ſhall pay nothing for her marriage, nor ſhall be diſtreined to marry afreſh, if ſhe chooſes to live without a huſband; but ſhall not however marry againſt the conſent of the lord; and farther, that nothing ſhall be taken for aſſignment of the widow's dower, but that ſhe ſhall remain in her huſband's capital manſion-houſe for forty days after his death, during which time her dower ſhall be aſſigned. Theſe forty days are called the widow's *quarentine*; a term made uſe of in law to ſignify the number of forty days, whether applied to this occaſion, or any other [a]. The particular lands, to be held in dower, muſt be aſſigned [b] by the heir of the huſband, or his guardian; not only for the ſake of notoriety, but alſo to entitle the lord of the fee to demand his ſervices of the heir, in reſpect of the lands ſo holden. For the heir by this entry becomes tenant

[u] §. 39. F. N. B. 150.
[w] § 41.
[x] Mirr. c. 1. §. 3.
[y] *ubi ſupra.*
[z] *cap.* 7.

[a] It ſignifies, in particular, the forty days, which perſons coming from infected countries are obliged to wait, before they are permitted to land in England.
[b] Co. Litt. 34, 35.

thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarentine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it [c]. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower [d]. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like [e].

UPON preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for, the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the antient law respecting dower *ad ostium ecclesiae*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them [f]: and, by the statute of Glocester [g], if a dowager alienes the land assigned her for dower she forfeits it *ipso facto*,

c Co. Litt. 34, 35.
d F. N. B. 148. Finch. L. 314. Stat. Westm. 2. 13 Edw. I. c. 7.
e Co. Litt. 32.
f *Ibid.* 39.
g 6 Edw. I. c. 7.

facto, and the heir may recover it by action. A woman alſo may be barred of her dower, by levying a fine, or ſuffering a recovery of the lands, during her coverture [h]. But the moſt uſual method of barring dowers is by jointures, as regulated by the ſtatute 27 Hen. VIII. c. 10.

A JOINTURE, which, ſtrictly ſpeaking, ſignifies a joint eſtate, limited to both huſband and wife, but in common acceptation extends alſo to a ſole eſtate, limited to the wife only, is thus defined by ſir Edward Coke [i]; "a competent "livelihood of freehold for the wife, of lands and tene-"ments; to take effect, in profit or poſſeſſion, preſently after "the death of the huſband; for the life of the wife at leaſt." This deſcription is framed from the purview of the ſtatute 27 Hen. VIII. c. 10. before-mentioned; commonly called the ſtatute of *uſes*, of which we ſhall ſpeak fully hereafter. At preſent I have only to obſerve, that before the making of that ſtatute, the greateſt part of the land of England was conveyed to uſes; the property or poſſeſſion of the ſoil being veſted in one man, and the *uſe*, or profits thereof, in another; whoſe directions, with regard to the diſpoſition thereof, the former was in conſcience obliged to follow, and might be compelled by a court of equity to obſerve. Now, though a huſband had the *uſe* of lands in abſolute fee-ſimple, yet the wife was not entitled to any dower therein; he not being *ſeiſed* thereof: wherefore it became uſual, on marriage, to ſettle by expreſs deed ſome ſpecial eſtate to the uſe of the huſband and his wife, for their lives, in joint-tenancy, or jointure; which ſettlement would be a proviſion for the wife in caſe ſhe ſurvived her huſband. At length the ſtatute of uſes ordained, that ſuch as had the *uſe* of lands, ſhould, to all intents and purpoſes, be reputed and taken to be abſolutely *ſeiſed* and poſſeſſed of the ſoil itſelf. In conſequence of which legal ſeiſin, all wives would have become dowable of ſuch lands as were held to the uſe of their huſbands, and alſo entitled at the ſame time to any ſpecial lands that might be ſettled in jointure: had not the ſame ſtatute provided, that upon making ſuch an eſtate in jointure to the wife before marriage, ſhe ſhall be for ever precluded from her dower [k].

h Pig. of recov. 66.

i 1 Inſt. 36.

k 4 Rep. 1, 2.

But

But then these four requisites must be punctually observed, 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur auter vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly *expressed to be* (*a*), in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law [1].

THERE are some advantages attending tenants in dower that do not extent to jointresses; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when

1 These settlements, previous to marriage, seem to have been in use among the antient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus affert: intersunt parentes et propinqui, et munera probant.*" (*de mor. Germ.* c. 18.) And Cæsar (*de bello Gallico, l.* 6. *c.* 18.) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, aestimatione facta, cum dotibus communicant. Hujus omnis pecuniae conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (*Nov.* 97.) with regard to the provision for widows among the Romans: but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

(*a*) Or it may be *averred to be*, Co. Lit. 36. b. 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, *but it was not so expressed in the deed*. And the opinion of the court was, that it might be *averred* that it was for a jointure, and that such averment was traversable. Owen, 33.

 derived

derived from the king's debtor, the king cannot diſtrein for his debt; if contracted during the coverture [m]. But, on the other hand, a widow may enter at once, without any formal proceſs, on her jointure land; as ſhe alſo might have done on dower *ad oſtium eccleſiae*, which a jointure in many points reſembles; and the reſemblance was ſtill greater, while that ſpecies of dower continued in it's primitive ſtate: whereas no ſmall trouble, and a very tedious method of proceeding, is neceſſary to compel a legal aſſignment of dower [n]. And, what is more, though dower be forfeited by the treaſon of the huſband, yet lands ſettled in jointure remain unimpeached to the widow [o]. Wherefore ſir Edward Coke very juſtly gives it the preference, as being more ſure and ſafe to the widow, than even dower *ad oſtium eccleſiae*, the moſt eligible ſpecies of any.

[m] Co. Litt. 31. a. F. N. B. 150. [n] Co. Litt. 36. [o] *Ibid.* 37.

CHAPTER THE NINTH.

OF ESTATES LESS THAN FREEHOLD.

OF eſtates that are leſs than freehold, there are three ſorts: 1. Eſtates for years: 2. Eſtates at will: 3. Eſtates by ſufferance.

I. AN eſtate for *years* is a contract for the poſſeſſion of lands or tenements, for ſome determinate period: and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the leſſor and the leſſee [a], and the leſſee enters thereon [b]. If the leaſe be but for half a year, or a quarter, or any leſs time, this leſſee is reſpected as a tenant for years, and is ſtiled ſo in ſome legal proceedings; a year being the ſhorteſt term which the law in this caſe takes notice of [c]. And this may, not improperly, lead us into a ſhort digreſſion, concerning the diviſion and calculation of time by the Engliſh law.

THE ſpace of a year is a determinate and well-known period, conſiſting commonly of 365 days: for, though in

[a] We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a paſſive ſignification; the former uſually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a leaſe is denominated the leſſor; and he to whom it is granted the leſſee. (Litt. §. 57.)

[b] *Ibid.* 58.

[c] *Ibid.* 67.

biſſextile

bissextile or leap years it consists properly of 366, yet by the statute 21 Hen. III the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the singular number, it is good for the whole year [d]. For herein the law recedes from it's usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes [e]. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

THESE estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to

[d] 6 Rep. 61. [e] Co. Litt. 135.

receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold [f]; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

WHILE estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told [g] that by the antient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe, in Madox's collection of antient instruments, some leases for years of a pretty early date, which considerably exceed that period [h]; and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III [i], and probably of Edward I [k]. But certainly, when by the statute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession,

f Co. Litt. 46.

g Mirror. c. 2. §. 27. Co. Litt. 45, 46.

h Madox *Formulare Anglican.* n°. 239. *fol.* 140. Demise for eighty years, 21 Ric. II. . . . . *Ibid.* n°. 245. *fol.* 146. for the like term. *A. D.* 1429. . . . . . *Ibid.* n°. 248. *fol.* 148. for fifty years, 7 Edw. IV.

i 32 Ass. pl. 6. Bro. abr. *t. mordauncestor.* 42. *spoliation.* 6.

k Stat. of mortmain, 7 Edw. I.

and with the ſame inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.

EVERY eſtate which muſt expire at a period certain and prefixed, by whatever words created, is an eſtate for years. And therefore this eſtate is frequently called a term, *terminus*, becauſe it's duration or continuance is bounded, limited, and determined: for every ſuch eſtate muſt have a certain beginning, and certain end [l]. But *id certum eſt, quod certum reddi poteſt*: therefore if a man make a leaſe to another, for ſo many years as J. S. ſhall name, it is a good leaſe for years [m]; for though it is at preſent uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this eſtate, it begins from the making, or delivery, of the leaſe [n]. A leaſe for ſo many years as J. S. ſhall live, is void from the beginning [o]; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the leaſe. And the ſame doctrine holds, if a parſon make a leaſe of his glebe for ſo many years as he ſhall continue parſon of Dale; for this is ſtill more uncertain. But a leaſe for twenty or more years, if J. S. ſhall ſo long live, or if he ſhould ſo long continue parſon, is good [p]: for there is a certain period fixed, beyond which it cannot laſt; though it may determine ſooner, on the death of J. S. or his ceaſing to be parſon there.

WE have before remarked, and endeavoured to aſſign the reaſon of, the inferiority in which the law places an eſtate for years, when compared with an eſtate for life, or an inheritance: obſerving, that an eſtate for life, even if it be *pur auter vie*, is a freehold; but that an eſtate for a thouſand years is only a chattel, and reckoned part of the perſonal eſtate [q]. Hence it follows, that a leaſe for years may be made to commence *in futuro*, though a leaſe for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for

l Co. Litt. 45.
m 6 Rep. 35.
n Co. Litt. 46.
o *Ibid.* 45.
p *Ibid.*
q *Ibid.* 46.

twenty

twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter [r]. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years [s]; the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term* to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term [t].

TENANT for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed [u] that tenant for life was entitled to; that is to say, house-bote, fire-bote, ploughbote, and hay-bote [w]; terms which have been already explained [x].

r 5 Rep. 94.
s Co. Litt. 46.
t *Ibid.* 45.
u pag. 122.
w Co. Litt. 45.
x pag. 35.

WITH regard to emblements, or the profits of lands ſowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midſummer for ten years, and in the laſt year he ſows a crop of corn, and it is not ripe and cut before midſummer, the end of his term, the landlord ſhall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to ſow what he never could reap the profits of [y]. But where the leaſe for years depends upon an uncertainty; as, upon the death of the leſſor, being himſelf only tenant for life, or being a huſband ſeiſed in right of his wife; or if the term of years be determinable upon a life or lives; in all theſe caſes, the eſtate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, ſhall have the emblements in the ſame manner that a tenant for life or his executors ſhall be entitled thereto [z]. Not ſo, if it determine by the act of the party himſelf: as if tenant for years does any thing that amounts to a forfeiture: in which caſe the emblements ſhall go to the leſſor, and not to the leſſee, who hath determined his eſtate by his own default [a].

II. THE ſecond ſpecies of eſtates not freehold, are eſtates, at *will*. An eſtate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the leſſor; and the tenant by force of this leaſe obtains poſſeſſion [b]. Such tenant hath no certain indefeaſible eſtate, nothing that can be aſſigned by him to any other; becauſe the leſſor may determine his will, and put him out whenever he pleaſes. But every eſtate at will is at the will of both parties, landlord and tenant; ſo that either of them may determine his will, and quit his connexions with the other at his own pleaſure [c]. Yet this muſt be underſtood with ſome reſtriction.

y Litt. §. 68.
z Co. Litt. 56.
a *Ibid.* 55.
b Litt. §. 68.
c Co. Litt. 55.

For, if the tenant at will sows his land, and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits [d]. And this for the same reason, upon which all the cases of emblements turn; *viz.* the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land [e].

WHAT act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land [f], or notice must be given to the lessee [g]) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber [h], taking a distress for rent and impounding it thereon [i], or making a feoffment, or lease for years of the land to commence immediately [k]; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure [l]; or, which is *instar omnium*, the death or outlawry of either lessor or lessee [m]; puts an end to or determines the estate at will.

THE law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of

d Co. Litt. 56.
e *Ibid.* 55.
f *Ibid.*
g 1 Ventr. 248.
h Co. Litt. 55.
i *Ibid.* 57.
k 1 Roll. Abr. 860. 2 Lev. 88.
l Co. Litt. 55.
m 5 Rep. 116. Co. Litt. 57. 62.

emblements before-mentioned; and, by a parity of reaſon, the leſſee, after the determination of the leſſor's will, ſhall have reaſonable ingreſs and egreſs to fetch away his goods and utenſils [n]. And, if rent be payable quarterly or half-yearly, and the leſſee determines the will, the rent ſhall be paid to the end of the current quarter or half-year [o]. And, upon the ſame principle, courts of law have of late years leaned as much as poſſible againſt conſtruing demiſes, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year ſo long as both parties pleaſe, eſpecially where an annual rent is reſerved: in which caſe they will not ſuffer either party to determine the tenancy even at the end of the year, without reaſonable notice to the other, which is generally underſtood to be ſix months [p].

THERE is one ſpecies of eſtates at will, that deſerves a more particular regard than any other; and that is, an eſtate held by copy of court roll; or, as we uſually call it, a *copyhold* eſtate. This, as was before obſerved [q], was in it's original and foundation nothing better that a mere eſtate at will. But, the kindneſs and indulgence of ſucceſſive lords of manors having permitted theſe eſtates to be enjoyed by the tenants and their heirs, according to particular cuſtoms eſtabliſhed in their reſpective diſtricts; therefore, though they ſtill are held at the will of the lord, and ſo are in general expreſſed in the court rolls to be, yet that will is qualified, reſtrained, and limited, to be exerted according to the cuſtom of the manor. This cuſtom, being ſuffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and aſcertained by the cuſtom to be the ſame, and no other, that has time out of mind been exerciſed and declared by his anceſtors. A copyhold tenant is therefore now full as properly a tenant by the cuſtom, as a tenant at will; the cuſtom

[n] Litt. §. 69.

[o] Salk. 414. 1 Sid. 339.

[p] This kind of leaſe was in uſe as long ago as the reign of Henry VIII. when half a year's notice ſeems to have been required to determine it. (*T.* 13 *Hen. VIII.* 15, 16.)

[q] pag. 93.

having arifen from a feries of uniform wills. And therefore it is rightly obferved by Calthorpe [r], that "copyholders and "cuftomary tenants differ not fo much in nature as in name: "for although fome be called copyholders, fome cuftomary, "fome tenants by the virge, fome bafe tenants, fome bond "tenants, and fome by one name and fome by another, yet "do they all agree in fubftance and kind of tenure: all the "faid lands are holden in one general kind, that is, by cuf-"tom and continuance of time; and the diverfity of their "names doth not alter the nature of their tenure."

ALMOST every copyhold tenant being therefore thus tenant at the will of the lord according to the cuftom of the manor; which cuftoms differ as much as the humour and temper of the refpective antient lords, (from whence we may account for their great variety) fuch tenant, I fay, may have, fo far as the cuftom warrants, any other of the eftates or quantities of intereft, which we have hitherto confidered, or may hereafter confider, and hold them united with this cuftomary eftate at will. A copyholder may, in many manors, be tenant in fee-fimple, in fee-tail, for life, by the curtefy, in dower, for years, at fufferance, or on condition: fubject however to be deprived of thefe eftates upon the concurrence of thofe circumftances which the will of the lord, promulged by immemorial cuftom, has declared to be a forfeiture or abfolute determination of thofe interefts; as in fome manors the want of iffue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of thefe interefts amount to freehold; for the freehold of the whole manor abides always in the lord only [s], who hath granted out the ufe and occupation, but not the corporeal feifin or true legal poffeffion, of certain parcels thereof, to thefe his cuftomary tenants at will.

THE reafon of originally granting out this complicated kind of intereft, fo that the fame man fhall, with regard to the fame land, be at one and the fame time tenant in fee-fimple and alfo tenant at the lord's will, feems to have arifen

[r] on copyholds. 51. 54.

[s] Litt. §. 81. 2 Inft. 325.

from

from the nature of villenage ten
estate of freehold, or even for yea
mediate enfranchisement of the villein [t].
though they were willing to enlarge the in
leins, by granting them estates which might en
lives, or sometimes be descendible to their issue, yet n
to manumit them entirely, might probably scruple to g
them any absolute freehold; and for that reason it seems to
have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it still to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be stiled in their admissions tenants at the will of the lord,—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest: and therefore continued and now continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the antient tenants in villein-socage [u], and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves [v]; who are sometimes called

t Mirr. c. 2. §. 28. Litt. §. 204, 5, 6.

u See page 98, &c.

v Fitz. *Abr. tit. corone.* 310. *custom.* 12 *Bro. Abr. tit. custom.* 2. 17. *tenant per copie.* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. §. 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

having arisen from a series of [illegible] freehold *interest*, it is rightly observed by [illegible] " customary tenan[illegible] [illegible]ld estates are still " for althoug[illegible] [illegible]d) among tenancies " some te[illegible] [illegible] life of the common " te[illegible] [illegible]rty in the copyholders, [illegible] [illegible]an bondmen, equal to [illegible] [illegible]nements holden of the [illegible]or; for we may now look [illegible] with a fine certain, to be [illegible]holder in point of interest, [illegible]rly in the clearness and secu-[illegible] [illegible]ly in a better situation.

III. An esta[illegible] [illegible]e, is where one comes into possession of land by lawful [illegible]e, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance[w]. But, no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by law: but his tenant, so holding over, is considered as an absolute intruder[x]. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger[y]: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

w Co. Litt. 57.
x *Ibid.*
y *Ibid.*

THUS

THUS ſtands the law, with regard to tenants by ſufferance; and landlords are obliged in theſe caſes to make formal entries upon their lands [z], and recover poſſeſſion by the legal proceſs of ejectment: and at the utmoſt, by the common law, the tenant was bound to account for the profits of the land ſo by him detained. But now, by ſtatute 4 Geo. II. c. 28. in caſe any tenant for life or years, or other perſon claiming under or by colluſion with ſuch tenant, ſhall wilfully hold over after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reverſion of the premiſes ſhall belong, for delivering the poſſeſſion thereof; ſuch perſon, ſo holding over or keeping the other out of poſſeſſion, ſhall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by ſtatute 11 Geo. II. c. 19. in caſe any tenant, having power to determine his leaſe, ſhall give notice of his intention to quit the premiſes, and ſhall not deliver up the poſſeſſion at the time contained in ſuch notice, he ſhall thenceforth pay double the former *rent*, for ſuch time as he continues in poſſeſſion. Theſe ſtatutes have almoſt put an end to the practice of tenancy by ſufferance, unleſs with the tacit conſent of the owner of the tenement.

[z] 5 Mod. 384.

CHAPTER THE TENTH.

OF ESTATES UPON CONDITION.

BESIDES the feveral divifions of eftates, in point of intereft, which we have confidered in the three preceding chapters, there is alfo another fpecies ftill remaining, which is called an eftate *upon condition;* being fuch whofe exiftence depends upon the happening or not happening of fome uncertain event, whereby the eftate may be either originally created, or enlarged, or finally defeated [a]. And thefe conditional eftates I have chofen to referve till laft, becaufe they are indeed more properly qualifications of other eftates, than a diftinct fpecies of themfelves; feeing that any quantity of intereft, a fee, a freehold, or a term of years, may depend upon thefe provifional reftrictions. Eftates then upon condition, thus underftood, are of two forts: 1. Eftates upon condition *implied:* 2. Eftates upon condition *expreffed:* under which laft may be included, 3. Eftates held *in vadio, gage,* or *pledge:* 4. Eftates by *ftatute merchant* or *ftatute ftaple:* 5. Eftates held by *elegit.*

I. ESTATES upon condition implied in law, are where a grant of an eftate has a condition annexed to it infeparably, from it's effence and conftitution, although no condition be expreffed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a fecret condition, that the grantee fhall duly execute his office [b], on breach of which condition

a Co. Litt. 201

b Litt. §. 378.

it

it is lawful for the grantor, or his heirs, to oust him, and grant it to another person [c]. For an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition. 1. *By mis-user*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture: but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby [d]. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention: but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief: upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect [e].

UPON the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to [f]. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit "felony," which the law tacitly annexes to every feodal donation.

c Litt. §. 379.
d Co. Litt. 233.
e 9 Rep. 50.
f Co. Litt. 215.

II. AN

II. AN eſtate on condition expreſſed in the grant itſelf, is where an eſtate is granted, either in fee-ſimple or otherwiſe, with an expreſs qualification annexed, whereby the eſtate granted ſhall either commence, be enlarged, or be defeated, upon performance or breach of ſuch qualification or condition [g]. Theſe conditions are therefore either *precedent*, or *ſubſequent*. Precedent are ſuch as muſt happen or be performed before the eſtate can veſt or be enlarged: ſubſequent are ſuch, by the failure or non-performance of which an eſtate already veſted may be defeated. Thus, if an eſtate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no eſtate [h] is veſted in A. Or, if a man grant to his leſſee for years, that upon payment of a hundred marks within the term he ſhall have the fee, this alſo is a condition precedent, and the fee-ſimple paſſeth not till the hundred marks be paid [i]. But if a man grant an eſtate in fee-ſimple, reſerving to himſelf and his heirs a certain rent; and that, if ſuch rent be not paid at the times limited, it ſhall be lawful for him and his heirs to re-enter, and avoid the eſtate: in this caſe the grantee and his heirs have an eſtate upon condition ſubſequent, which is defeaſible if the condition be not ſtrictly performed [k]. To this claſs may alſo be referred all baſe fees, and fee-ſimples conditional at the common law [l]. Thus an eſtate to a man and his heirs, *tenants of the manor of Dale*, is an eſtate on condition that he and his heirs continue tenants of that manor. And ſo, if a perſonal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the ſtatute of Weſtminſter the ſecond, it remains, as at common law, a fee-ſimple on condition that the grantee has heirs of his body. Upon the ſame principle depend all the determinable eſtates of freehold, which we mentioned in the eighth chapter: *as durante viduitate, &c*: theſe are eſtates upon condition that the grantees do not marry, and the like. And, on the breach of any of theſe

g Co. Litt. 201.
h Show. Parl. Caſ. 83, &c.
i Co. Litt. 217.
k Litt. §. 325.
l See pag. 109, 110, 111.

subsequent conditions, by the failure of these contingencies; by the grantees's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

A DISTINCTION is however made between a *condition in deed* and a *limitation*, which Littleton [m] denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of it's creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like [n]. In such case the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500*l.*) and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c. [o]) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate [p]. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs) this the law construes to be a limitation and not a

m §. 380. 1 Inst. 234.
n 10 Rep. 41.
o *Ibid.* 42.
p Litt. §. 347. Stat. 32 Hen. VIII. c. 34.

condition:

condition [q]: becauſe, if it were a condition, then, upon the breach thereof, only A or his repreſentatives could avoid the eſtate by entry, and ſo D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the eſtate of B determines, and that of D commences, and he may enter on the lands, the inſtant that the failure happens. So alſo, if a man by his will deviſes land to his heir at law, on condition that he pays a ſum of money, and for non-payment deviſes it over, this ſhall be conſidered as a limitation; otherwiſe no advantage could be taken of the non-payment, for none but the heir himſelf could have entered for a breach of condition [r].

IN all theſe inſtances, of limitations or conditions ſubſequent, it is to be obſerved, that ſo long as the condition, either expreſs or implied, either in deed or in law, remains unbroken, the grantee may have an eſtate of freehold, provided the eſtate upon which ſuch condition is annexed be in itſelf of a freehold nature; as if the original grant expreſs either an eſtate of inheritance, or for life, or no eſtate at all, which is conſtructively an eſtate for life. For the breach of theſe conditions being contingent and uncertain, this uncertainty preſerves the freehold [s]; becauſe the eſtate is capable to laſt for ever, or at leaſt for the life of the tenant, ſuppoſing the condition to remain unbroken. But where the eſtate is at the utmoſt a chattel intereſt, which muſt determine at a time certain, and may determine ſooner, (as a grant for ninety-nine years, provided A, B, and C, or the ſurvivor of them, ſhall ſo long live) this ſtill continues a mere chattel, and is not, by ſuch it's uncertainty, ranked among eſtates of freehold.

THESE expreſs conditions, if they be *impoſſible* at the time of their creation, or afterwards become impoſſible by the act of God or the act of the feoffor himſelf, or if they be *contrary to law*, or *repugnant* to the nature of the eſtate, are void. In any of which caſes, if they be conditions *ſubſequent*, that

q 1 Ventr. 202.
r Cro. Eliz. 205. 1 Roll. Abr. 411.
s Co. Litt. 42.

is, to be performed after the eſtate is veſted, the eſtate ſhall become abſolute in the tenant. As, if a feoffment be made to a man in fee-ſimple, on condition that unleſs he goes to Rome in twenty-four hours; or unleſs he marries with Jane S. by ſuch a day; (within which time the woman dies, or the feoffor marries her himſelf) or unleſs he kills another; or in caſe he alienes in fee; that then and in any of ſuch caſes the eſtate ſhall be vacated and determine: here the condition is void, and the eſtate made abſolute in the feoffee. For he hath by the grant the eſtate veſted in him, which ſhall not be defeated afterwards by a condition either impoſſible, illegal, or repugnant [t]. But if the condition be *precedent*, or to be performed before the eſtate veſts, as a grant to a man that, if he kills another or goes to Rome in a day, he ſhall have an eſtate in fee; here, the void condition being precedent, the eſtate which depends thereon is alſo void, and the grantee ſhall take nothing by the grant: for he hath no eſtate until the condition be performed [u].

THERE are ſome eſtates defeaſible upon condition ſubſequent, that require a more peculiar notice. Such are

III. ESTATES held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

VIVUM *vadium*, or living pledge, is when a man borrows a ſum (ſuppoſe 200*l.*) of another; and grants him an eſtate, as, of 20*l. per annum*, to hold till the rents and profits ſhall repay the ſum ſo borrowed. This is an eſtate conditioned to be void, as ſoon as ſuch ſum is raiſed. And in this caſe the land or pledge is ſaid to be living: it ſubſiſts, and ſurvives the debt; and, immediately on the diſcharge of that, reſults back to the borrower [w]. But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other) is where a man borrows of another a ſpecific ſum (*e. g.* 200*l.*)

[t] Co. Litt. 206.
[u] *Ibid.*
[w] *Ibid.* 205.

and

and grants him an eſtate in fee, on condition that if he, the mortgagor, ſhall repay the mortgagee the ſaid ſum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the eſtate ſo granted in pledge; or, as is now the more uſual way, that then the mortgagee ſhall reconvey the eſtate to the mortgagor: in this caſe the land, which is ſo put in pledge, is by law, in caſe of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's eſtate in the lands is then no longer conditional, but abſolute. But, ſo long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage [x]. But, as it was formerly a doubt [y], whether, by taking ſuch eſtate in fee, it did not become liable to the wife's dower, and other incumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity [z]) it therefore became uſual to grant only a long term of years, by way of mortgage; with condition to be void on re-payment of the mortgage-money: which courſe has been ſince pretty generally continued, principally becauſe on the death of the mortgagee ſuch term becomes veſted in his perſonal repreſentatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As ſoon as the eſtate is created, the mortgagee may immediately enter on the lands; but is liable to be diſpoſſeſſed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the uſual way is to agree that the mortgagor ſhall hold the land till the day aſſigned for payment; when, in caſe of failure, whereby the eſtate becomes abſolute, the mortgagee may enter upon it and take poſſeſſion, without any poſſibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpoſe; and, though a mortgage be thus forfeited, and the

x Litt. §. 332.

y *Ibid.* §. 357. Cro. Car. 191.

z Hardr. 466.

estate

eſtate abſolutely veſted in the mortgagee at the common law, yet they will conſider the real value of the tenements compared with the ſum borrowed. And, if the eſtate be of greater value than the ſum lent thereon, they will allow the mortgagor at any reaſonable time to recall or redeem his eſtate; paying to the mortgagee his principal, intereſt, and expenſes: for otherwiſe, in ſtrictneſs of law, an eſtate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a leſs ſum. This reaſonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has poſſeſſion of his eſtate, to deliver it back and account for the rents and profits received, on payment of his whole debt and intereſt; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the ſale of the eſtate, in order to get the whole of his money immediately; or elſe call upon the mortgagor to redeem his eſtate preſently, or, in default thereof, to be for ever *foreclosed* from redeeming the ſame; that is, to loſe his equity of redemption without poſſibility of recall. And alſo, in ſome caſes of fraudulent mortgages[a], the fraudulent mortgagor forfeits all equity of redemption whatſoever. It is not however uſual for mortgagees to take poſſeſſion of the mortgaged eſtate, unleſs where the ſecurity is precarious, or ſmall; or where the mortgagor neglects even the payment of intereſt: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more reſembles their *hypotheca*, which was where the poſſeſſion of the thing pledged remained with the debtor[b]. But, by ſtatute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, intereſt, and coſts, the mortgagee can maintain no ejectment; but may be compelled to re-aſſign his ſecurities. In Glanvil's time, when the univerſal method of conveyance

[a] Stat. 4 & 5. W. & M. c. 16.

[b] *Pignoris appellatione eam proprie rem contineri dicimus, quae ſimul etiam traditur creditori. At eam, quae ſine traditione nuda conventione tenetur, proprie hypothecae appellatione contineri dicimus.* *Inſt. l.* 4. *t.* 6. §. 7.

was

was by livery of ſeiſin or corporal tradition of the lands, no gage or pledge of lands was good unleſs poſſeſſion was alſo delivered to the creditor; "*ſi non ſequatur ipſius vadii tra-" ditio, curia domini regis hujuſmodi privatas conventiones tueri" non ſolet*:" for which the reaſon given is, to prevent ſubſequent and fraudulent pledges of the ſame land: "*cum in tali" caſu poſſit eadem res pluribus aliis creditoribus tum prius tum" poſterius invadiari* [c]." And the frauds which have ariſen, ſince the exchange of theſe public and notorious conveyances for more private and ſecret bargains, have well evinced the wiſdom of our antient law.

IV. A FOURTH ſpecies of eſtates, defeaſible on condition ſubſequent, are thoſe held by *ſtatute merchant*, and *ſtatute ſtaple*; which are very nearly related to the *vivum vadium* before-mentioned, or eſtate held till the profits thereof ſhall diſcharge a debt liquidated or aſcertained. For both the ſtatute merchant and ſtatute ſtaple are ſecurities for money; the one entered into before the chief magiſtrate of ſome trading town, purſuant to the ſtatute 13 Edw. I. *de mercatoribus*, and thence called a ſtatute merchant; the other purſuant to the ſtatute 27 Edw. III. c. 9. before the mayor of the ſtaple, that is to ſay, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns [d], from whence this ſecurity is called a ſtatute ſtaple. They are both, I ſay, ſecurities for debts acknowleged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be impriſoned, and his goods ſeiſed in ſatisfaction of the debt, but alſo his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be ſatisfied: and, during ſuch time as the creditor ſo holds the lands, he is tenant by ſtatute merchant or ſtatute ſtaple. There is alſo a ſimilar ſecurity, the recognizance in the nature of a ſtatute ſtaple, acknowleged before either of the chief juſtices, or (out of term) before their ſubſtitutes, the mayor of the ſtaple at Weſtminſter and the recorder of London; whereby the benefit of this mercantile tranſaction is extended to all the king's

c *l.* 10. *c.* 8.

d See book I. c. 8.

subjects in general, by virtue of the statute 23 Hen. VIII. c. 6. amended by 8 Geo. I. c. 25. which direct such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. c. 3. are only binding upon the lands in the hands of *bona fide* purchasors, from the day of their enrolment, which is ordered to be marked on the record.

V. ANOTHER similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute [e] of Westm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed, until his debt and damages are fully paid: and, during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feodal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores* [f], it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year [g]) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I SHALL conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the ob-

[e] 13 Edw. I. c. 18.
[f] 18 Edw. I.
[g] 13 Edw. I.

ſervation of ſir Edward Coke [h], "Theſe tenants have uncertain intereſts in lands and tenements, and yet they have "but chattels and no freeholds;" (which makes them an exception to the general rule) "becauſe though they may "hold an eſtate of inheritance, or for life, *ut liberum tene-* "*mentum*, until their debt be paid; yet it ſhall go to their "executors: for *ut* is ſimilitudinary; and though, to recover "their eſtates, they ſhall have the ſame remedy (by aſſiſe) as "a tenant of the freehold ſhall have [i], yet it is but the ſimili-"tude of a freehold, and *nullum ſimile eſt idem.*" This indeed only proves them to be chattel intereſts, becauſe they go to the executors, which is inconſiſtent with the nature of a freehold: but it does not aſſign the reaſon why theſe eſtates, in contradiſtinction to other uncertain intereſts, ſhall veſt in the executors of the tenant and not the heir; which is probably owing to this: that, being a ſecurity and remedy provided for perſonal debts due to the deceaſed, to which debts the executor is entitled, the law has therefore thus directed their ſucceſſion; as judging it reaſonable, from a principle of natural equity, that the ſecurity and remedy ſhould be veſted in thoſe to whom the debts if recovered would be long. For, upon the ſame principle, if lands be deviſed to a man's executor, until out of their profits the debts due from the teſtator be diſcharged, this intereſt in the lands ſhall be a chattel intereſt, and on the death of ſuch executor ſhall go to *his* executor [k]: becauſe they, being liable to pay the original teſtator's debts, ſo far as his aſſets will extend, are in reaſon entitled to poſſeſs that fund, out of which he has directed them to be paid.

h 1 Inſt. 42, 43.

i The words of the ſtatute *de mercatoribus* are, "*puiſſe porter bref de novele diſſeiſine, auxi ſicum de franktenement.*"

k Co. Litt. 42.

CHAPTER THE ELEVENTH.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have conſidered eſtates ſolely with regard to their duration, or the *quantity of intereſt* which the owners have therein. We are now to conſider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages ariſing therefrom) begins. Eſtates therefore, with reſpect to this conſideration, may either be in *poſſeſſion*, or in *expectancy*: and of expectancies there are two ſorts; one created by the act of the parties, called a *remainder*; the other by act of law, and called a *reverſion*.

I. OF eſtates in *poſſeſſion*, (which are ſometimes called eſtates *executed*, whereby a preſent intereſt paſſes to and reſides in the tenant, not depending on any ſubſequent circumſtance or contingency, as in the caſe of eſtates *executory*) there is little or nothing peculiar to be obſerved. All the eſtates we have hitherto ſpoken of are of this kind; for, in laying down general rules, we uſually apply them to ſuch eſtates as are then actually in the tenant's poſſeſſion. But the doctrine of eſtates in expectancy contains ſome of the niceſt and moſt abſtruſe learning in the Engliſh law. Theſe will therefore require a minute diſcuſſion, and demand ſome degree of attention.

II. AN eſtáte then in remainder may be defined to be, an eſtate limited to take effect and be enjoyed after another eſtate is determined. As if a man ſeiſed in fee-ſimple granteth lands to A for twenty years, and, after the determination of the ſaid term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the firſt place an eſtate for years is created or carved out of the fee, and given to A; and the reſidue or remainder of it is given to B. But both theſe intereſts are in fact only one eſtate; the preſent term of years and the remainder afterwards, when added together, being equal only to one eſtate in fee [a]. They are indeed different *parts*, but they conſtitute only one *whole*: they are carved out of one and the ſame inheritance: they are both created, and may both ſubſiſt, together; the one in poſſeſſion, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the ſaid term to B for life; and after the determination of B's eſtate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the eſtate of inheritance undergoes a diviſion into three portions: there is firſt A's eſtate for years carved out of it; and after that B's eſtate for life; and then the whole that remains is limited to C and his heirs. And here alſo the firſt eſtate, and both the remainders, for life and in fee, are one eſtate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would ſtill be the ſame thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence alſo it is eaſy to collect, that no remainder can be limited after the grant of an eſtate in fee-ſimple [b]: becauſe a fee-ſimple is the higheſt and largeſt eſtate, that a ſubject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the eſtate: a remainder therefore, which is only a portion, or reſiduary *part*, of the eſtate, cannot be reſerved after the whole is diſpoſed of. A particular eſtate, with all

[a] Co. Litt. 143.

[b] Plowd. 29. Vaugh. 269.

the

the remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting.

THUS much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

1. AND, first, there must necessarily be some particular estate, precedent to the estate in remainder [c]. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

AN estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the antient law [d], to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an antient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder [e]: because at com-

[c] Co. Litt. 49. Plowd. 25.
[d] Raym. 151.
[e] 5 Rep. 94.

mon law no freehold in lands could paſs without livery of ſeiſin; which muſt operate either immediately, or not at all. It would therefore be contradictory, if an eſtate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate poſſeſſion. Therefore, though a leaſe to A for ſeven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next enſuing, is void. So that when it is intended to grant an eſtate of freehold, whereof the enjoyment ſhall be deferred till a future time, it is neceſſary to create a previous particular eſtate, which may ſubſiſt till that period of time is completed; and for the grantor to deliver immediate poſſeſſion of the land to the tenant of this particular eſtate, which is conſtrued to be giving poſſeſſion to him in remainder, ſince his eſtate and that of the particular tenant are one and the ſame eſtate in law. As, where one leaſes to A for three years, with remainder to B in fee, and makes livery of ſeiſin to A; here by the livery the freehold is immediately created, and veſted in B, during the continuance of A's term of years. The whole eſtate paſſes at once from the grantor to the grantees, and the remainder-man is ſeiſed of his remainder at the ſame time that the termor is poſſeſſed of his term. The enjoyment of it muſt indeed be deferred till hereafter; but it is to all intents and purpoſes an eſtate commencing *in praeſenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created, without ſuch a precedent particular eſtate, therefore the particular eſtate is ſaid to *ſupport* the remainder. But a leaſe at will is not held to be ſuch a particular eſtate, as will ſupport a remainder over [f]. For an eſtate at will is of a nature ſo ſlender and precarious, that it is not looked upon as a portion of the inheritance; and a portion muſt firſt be taken out of it, in order to conſtitute a remainder. Beſides, if it be a freehold remainder, livery of ſeiſin muſt be given at the time of it's creation; and the entry of the grantor, to do this, determines the eſtate at will

[f] 8 Rep. 75.

in the very instant in which it is made [g]: or, if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken [h]. And hence it is generally true, that if the particular estate is void in it's creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also [i]: as where the particular estate is an estate for the life of a person not *in esse* [k]; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate [l]; in either of these cases the remainder over is void.

2. A SECOND rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate [m]. As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this, which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void [n]. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law [o].

g Dyer. 18.
h Raym. 151.
i Co. Litt. 298.
k 2 Roll. Ab. 415.
l 1 Jon. 58.
m Litt. §. 671. Plowd. 25.
n Litt. §. 60.
o Co. Litt. 49.

3. A THIRD rule refpecting remainders is this; that the remainder muft veft in the grantee during the continuance of the particular eftate, or *eo inftanti* that it determines [p]. As, if A be tenant for life, remainder to B in tail; here B's remainder is vefted in him, at the creation of the particular eftate to A for life: or, if A and B be tenants for their joint lives, remainder to the furvivor in fee; here, though during their joint lives the remainder is vefted in neither, yet on the death of either of them, the remainder vefts inftantly in the furvivor: wherefore both thefe are good remainders. But, if an eftate be limited to A for life, remainder to the eldeft fon of B in tail, and A dies before B hath any fon; here the remainder will be void, for it did not veft in any one during the continuance, nor at the determination, of the particular eftate: and, even fuppofing that B fhould afterwards have a fon, he fhall not take by this remainder; for, as it did not veft at or before the end of the particular eftate, it never can veft at all, but is gone for ever [q]. And this depends upon the principle before laid down, that the precedent particular eftate, and the remainder, are one eftate in law; they muft therefore fubfift and be *in effe* at one and the fame inftant of time, either during the continuance of the firft eftate or at the very inftant when that determines, fo that no other eftate can poffibly come between them. For there can be no intervening eftate between the particular eftate, and the remainder fupported thereby [r]: the thing fupported muft fall to the ground, if once it's fupport be fevered from it.

IT is upon thefe rules, but principally the laft, that the doctrine of *contingent* remainders depends. For remainders are either *vefted* or *contingent*. *Vefted* remainders (or remainders *executed*, whereby a prefent intereft paffes to the party, though to be enjoyed *in futuro*) are where the eftate is invariably fixed, to remain to a determinate perfon, after the par-

[p] Plowd. 25. 1 Rep. 66.
[q] 1 Rep. 138.
[r] 3 Rep. 21.

ticular estate is spent. As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

CONTINGENT or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect[s].

FIRST, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enseint* or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest[t]. But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb[u].

THIS species of contingent remainders, to a person not in being, must however be limited to some one, that may by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines[w]. As if an estate be

[s] 3 Rep. 20.
[t] Salk. 228. 4 Mod. 282.
[u] See Vol. I. pag. 130.
[w] 2 Rep. 51.

made

made to A for life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis:* but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law [x]. But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void [y]. For here there must two contingencies happen; first, that such a person as B shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good; for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name [z]. A limitation of a remainder to a bastard before it is born, is not good [a]: for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

A REMAINDER may also be contingent, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is for ever gone; but if A dies first, the remainder to B becomes vested.

x Co. Litt. 378.

y Hob. 33.

z 5 Rep. 51.

a Cro. Eliz. 509.

CONTINGENT remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void [b]: but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest no where: unless therefore the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

CONTINGENT remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested [c]. Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those remainders vest; the consequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take

b 1 Rep. 130.

c *Ibid.* 66. 135.

effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by sir Orlando Bridgman, sir Geoffrey Palmer, and other eminent council, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life [d]: and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

THUS the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons, upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

AN executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not

[d] See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

any particular eſtate to ſupport it. 2. That by it a fee-ſimple or other leſs eſtate, may be limited after a fee-ſimple. 3. That by this means a remainder may be limited of a chattel intereſt, after a particular eſtate for life created in the ſame.

1. The firſt caſe happens when a man deviſes a future eſtate to ariſe upon a contingency; and, till that contingency happens, does not diſpoſe of the fee-ſimple, but leaves it to deſcend to his heir at law. As if one deviſes land to a feme-ſole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular eſtate to ſupport it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory deviſe [e]. For, ſince by a deviſe a freehold may paſs without corporal tradition or livery of ſeiſin, (as it muſt do, if it paſſes at all) therefore it may commence *in futuro*; becauſe the principal reaſon why it cannot commence *in futuro* in other caſes, is the neceſſity of actual ſeiſin, which always operates *in praeſenti*. And, ſince it may thus commence *in futuro*, there is no need of a particular eſtate to ſupport it; the only uſe of which is to make the remainder, by it's unity with the particular eſtate, a preſent intereſt. And hence alſo it follows, that ſuch an executory deviſe, not being a preſent intereſt, cannot be barred by a recovery, ſuffered before it commences [f].

2. By executory deviſe a fee, or other leſs eſtate, may be limited after a fee. And this happens where a deviſor deviſes his whole eſtate in fee, but limits a remainder thereon to commence on a future contingency. As if a man deviſes land to A and his heirs; but, if he dies before the age of twenty-one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory deviſe [g]. But, in both theſe ſpecies of executory deviſes, the contingencies ought to be ſuch as may happen within a reaſonable time; as within one or more life or lives in being, or within a mode-

[e] 1 Sid. 153.
[f] Cro. Jac. 593.
[g] 2 Mod. 289.

rate

rate term of years; for courts of juſtice will not indulge even wills, ſo as to create a perpetuity, which the law abhors[h]: becauſe by perpetuities, (or the ſettlement of an intereſt, which ſhall go in the ſucceſſion preſcribed, without any power of alienation[i]) eſtates are made incapable of anſwering thoſe ends, of ſocial commerce, and providing for the ſudden contingencies of private life, for which property was at firſt eſtabliſhed. The utmoſt length that has been hitherto allowed for the contingency of an executory deviſe of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are deviſed to ſuch unborn ſon of a feme-covert, as ſhall firſt attain the age of twenty-one, and his heirs; the utmoſt length of time that can happen before the eſtate can veſt, is the life of the mother and the ſubſequent infancy of her ſon: and this hath been decreed to be a good executory deviſe[k].

3. By executory deviſe a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the firſt grant of it, to a man for life, was a total diſpoſition of the whole term; a life eſtate being eſteemed of a higher and larger nature than any term of years[l]. And, at firſt, the courts were tender, even in the caſe of a will, of reſtraining the deviſee for life from aliening the term; but only held, that in caſe he died without exerting that act of ownerſhip, the remainder over ſhould then take place[m]: for the reſtraint of the power of alienation, eſpecially in very long terms, was introducing a ſpecies of perpetuity. But, ſoon afterwards, it was held[n], that the deviſee for life hath no power of aliening the term, ſo as to bar the remainder-man: yet, in order to prevent the danger of perpetuities, it was ſettled[o], that though ſuch remainders may be limited to as many perſons ſucceſſively as the deviſor thinks proper, yet they muſt all be

h 12 Mod. 287. 1 Vern. 164.
i Salk. 229.
k Forr. 232.
l 8 Rep. 95.
m Bro. *tit. chatteles*. 23. Dyer. 74.
n Dyer. 358. 8 Rep. 96.
o 1 Sid. 451.

in esse during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee [p].

THUS much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

III. AN estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him [q]. Sir Edward Coke [r] describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferrable, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.

THE doctrine of reversions is plainly derived from the feodal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death or the failure of issue male, the feud was determined and resulted back to the

[p] Skinn. 341. 3 P. Wms. 358.
[q] Co. Litt. 22.
[r] 1 Inst. 142.

lord

lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowlegment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident; though not inseparably so, to the reversion[s]. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is "*accessorium non* "*ducit, sed sequitur, suum principale*[t]."

THESE *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion[u], to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done[w]: for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate[x].

[s] Co. Litt. 143.
[t] *Ibid.* 151, 152.
[u] Cro. Elis. 321.
[w] 3 Lev. 407.
[x] 1 And. 23.

IN order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18. that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or it's commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

BEFORE we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate [y], the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en auter droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife [z]. An estate-tail is an exception to this rule: for a man may have in his own right both an estate tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee [a]. For estates-tail are protected and preserved from merger by the

[y] 3 Lev. 437.
[z] Plow. 418. Cro. Jac. 275. Co. Litt. 338.
[a] 2 Rep. 61. 8 Rep. 74.

operation and construction, though not by the express words, of the statute *de donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate [b]. But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like [c]: it would therefore have been strangely improvident, to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

[b] Cro. Eliz. 302.

[c] See pag. 116.

CHAPTER THE TWELFTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

WE come now to treat of eſtates, with reſpect to the number and connexions of their owners, the tenants who occupy and hold them. And, conſidered in this view, eſtates of any quantity or length of duration, and whether they be in actual poſſeſſion or expectancy, may be held in four different ways; in ſeveralty, in joint-tenancy, in coparcenary, and in common.

I. HE that holds lands or tenements in *ſeveralty*, or is ſole tenant thereof, is he that holds them in his own right only, without any other perſon being joined or connected with him in point of intereſt, during his eſtate therein. This is the moſt common and uſual way of holding an eſtate; and therefore we may make the ſame obſervations here, that we did upon eſtates in poſſeſſion, as contradiſtinguiſhed from thoſe in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, ſince all eſtates are ſuppoſed to be of this ſort, unleſs where they are expreſsly declared to be otherwiſe; and that in laying down general rules and doctrines, we uſually apply them to ſuch eſtates as are held in ſeveralty. I ſhall therefore proceed to conſider the other three ſpecies of eſtates, in which there are always a plurality of tenants.

II. AN eſtate in *joint-tenancy* is where lands or tenements are granted to two or more perſons, to hold in fee-ſimple, fee-tail, for life, for years, or at will. In conſequence of

ſuch grants an eſtate is called an eſtate in joint-tenancy [a], and ſometimes an eſtate in *jointure*, which word as well as the other ſignifies an union or conjunction of intereſt; though in common ſpeech the term *jointure*, is now uſually confined to that joint eſtate, which by virtue of the ſtatute 27 Hen. VIII. c. 10. is frequently veſted in the huſband and wife before marriage, as a full ſatisfaction and bar of the woman's dower [b].

IN unfolding this title, and the two remaining ones in the preſent chapter, we will firſt inquire, how theſe eſtates may be *created*; next, their *properties* and reſpective *incidents*; and laſtly, how they may be *ſevered* or *deſtroyed*.

1. THE *creation* of an eſtate in joint-tenancy depends on the wording of the deed or deviſe, by which the tenants claim title; for this eſtate can only ariſe by purchaſe or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an eſtate be given to a plurality of perſons, without adding any reſtrictive, excluſive, or explanatory words, as if an eſtate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant ſo as to make all parts of it take effect, which can only be done by creating an equal eſtate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other reſpects. For,

2. THE *properties* of a joint eſtate are derived from it's unity, which is fourfold; the unity of *intereſt*, the unity of *title*, the unity of *time*, and the unity of *poſſeſſion*: or, in other words, joint-tenants have one and the ſame intereſt, accruing by one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion.

FIRST, they muſt have one and the ſame *intereſt*. One joint-tenant cannot be entitled to one period of duration or quantity of intereſt in lands, and the other to a different;

[a] Litt. §. 277.

[b] See pag. 137.

one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail [c]. But, if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance [d]. If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail [e]. Secondly, joint-tenants must also have an unity of *title:* their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin [f]. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of *time:* their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another [g]. Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint-estate, though

c Co. Litt. 188.
d Litt. §. 277.
e *Ibid.* §. 285.
f *Ibid.* §. 278.
g Co. Litt. 188.

vested at different times [g]: because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy, there must be an unity of *possession*. Joint-tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire possession, as well of every *parcel* as of the *whole* [h]. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety [i]. And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor [k].

UPON these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion [l]. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate [m]. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them [n]: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both [o]. In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other [p]. But if two or more joint-tenants be

g Dyer. 340. 1 Rep. 101.

h Litt. §. 288. 5 Rep. 10.

i *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* Bract. *l.* 5. *tr.* 5. *c.* 26.

k Litt. §. 665. Co. Litt. 187. Bro. *Abr. t. cui in vita.* 8. 2 Vern. 120. 2 Lev. 39.

l Co. Litt. 214.

m *Ibid.* 192.

n *Ibid.* 49.

o *Ibid.* 319. 364.

p *Ibid.* 195.

seised

ſeiſed of an advowſon, and they preſent different clerks, the biſhop may refuſe to admit either: becauſe neither joint-tenant hath a ſeveral right of patronage, but each is ſeiſed of the whole: and, if they do not both agree within ſix months, the right of preſentation ſhall lapſe. But the ordinary may, if he pleaſes, admit a clerk preſented by either, for the good of the church, that divine ſervice may be regularly performed; which is no more than he otherwiſe would be entitled to do, in caſe their diſagreement continued, ſo as to incur a lapſe: and, if the clerk of one joint-tenant be ſo admitted, this ſhall keep up the title in both of them; in reſpect of the privity and union of their eſtate [q]. Upon the ſame ground it is held, that one joint-tenant cannot have an action againſt another for treſpaſs, in reſpect of his land [r]; for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himſelf to do any act, which may tend to defeat or injure the eſtate of the other; as to let leaſes, or to grant copyholds [s]: and, if any waſte be done, which tends to the deſtruction of the inheritance, one joint-tenant may have an action of waſte againſt the other, by conſtruction of the ſtatute Weſtm. 2. c. 22 [t]. So too, though at common law no action of account lay for one joint-tenant againſt another, unleſs he had conſtituted him his bailiff or receiver [u], yet now by the ſtatute 4 Ann. c. 16. joint-tenants may have actions of account againſt each other, for receiving more than their due ſhare of the profits of the tenements held in joint-tenancy.

FROM the ſame principle alſo ariſes the remaining grand incident of joint eſtates; *viz.* the doctrine of *ſurvivorſhip*: by which when two or more perſons are ſeiſed of a joint eſtate, of inheritance, for their own lives, or *per auter vie*, or are jointly poſſeſſed of any chattel intereſt, the entire tenancy upon the deceaſe of any of them remains to the ſurvivors, and at length to the laſt ſurvivor; and he ſhall be entitled to the whole eſtate, whatever it be, whether an inheritance or a common freehold only, or even a leſs eſtate [w].

[q] Co. Litt. 185.
[r] 3 Leon. 262.
[s] 1 Leon. 234.
[t] 2 Inſt. 403.
[u] Co. Litt. 200.
[w] Litt. §. 280, 281.

This is the natural and regular confequence of the union and entirety of their intereft. The intereft of two joint-tenants is not only equal or fimilar, but alfo is one and the fame. One has not originally a diftinct moiety from the other; but, if by any fubfequent act (as by alienation or forfeiture of either) the intereft becomes feparate and diftinct, the joint-tenancy inftantly ceafes. But, while it continues, each of two joint-tenants has a concurrent intereft in the whole; and therefore, on the death of his companion, the fole intereft in the whole remains to the furvivor. For the intereft, which the furvivor originally had, is clearly not devefted by the death of his companion; and no other perfon can now claim to have a *joint* eftate with him, for no one can now have an intereft in the whole, accruing by the fame title, and taking effect at the fame time with his own; neither can any one claim a *feparate* intereft in any part of the tenements; for that would be to deprive the furvivor of the right which he has in all, and every part. As therefore the furvivor's original intereft in the whole ftill remains; and as no one can now be admitted, either jointly or feverally, to any fhare with him therein; it follows, that his own intereft muft now be entire and feveral, and that he fhall alone be entitled to the whole eftate (whatever it be) that was created by the original grant.

THIS right of furvivorfhip is called by our antient authors [x] the *jus accrefcendi*, becaufe the right, upon the death of one joint-tenant, accumulates and increafes to the furvivors; or, as they themfelves exprefs it, "*pars illa communis accrefcit fuper-* "*ftitibus, de perfona in perfonam, ufque ad ultimam fuperftitem.*" And this *jus accrefcendi* ought to be mutual; which I apprehend to be one reafon why neither the king [y], nor any corporation [z], can be a joint-tenant with a private perfon. For here is no mutuality: the private perfon has not even the remoteft chance of being feifed of the entirety, by benefit of furvivorfhip; for the king and the corporation can never die.

[x] Bracton, *l.* 4. *tr.* 3. *c.* 9. §. 3. Fleta. *l.* 3. *c.* 4.

[y] Co. Litt. 190. Finch. L. 83.

[z] 2 Lev. 12.

3. WE are, lastly, to inquire, how an estate in joint-tenancy may be *severed* and *destroyed*. And this may be done by destroying any of it's constituent unities. 1. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed, (being now past) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed [a]. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do [b]: for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands [c]. 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common [d]; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor) though, till partition made, the unity of possession continues. But a devise of one's share by will

a Co. Litt. 188. 193.

b Litt. §. 290.

c Thus, by the civil law, *nemo invitus compellitur ad communionem*. (*Ff*. 12. 6. 26. §. 4.) And again: *si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest*. (*Ff*. 10. 3. 8.)

d Litt. §. 292.

is no ſeverance of the jointure: for no teſtament takes effect till after the death of the teſtator, and by ſuch death the right of the ſurvivor (which accrued at the original creation of the eſtate, and has therefore a priority to the other [e]) is already veſted [f]. 4. It may alſo be deſtroyed, by deſtroying the unity of *intereſt*. And therefore, if there be two joint-tenants for life, and the inheritance is purchaſed by or deſcends upon either, it is a ſeverance of the jointure [g]: though, if an eſtate is originally limited to two for life, and after to the heirs of one of them, the freehold ſhall remain in jointure, without merging in the inheritance; becauſe, being created by one and the ſame conveyance, they are not ſeparate eſtates, (which is requiſite in order to a merger) but branches of one entire eſtate [h]. In like manner, if a joint-tenant in fee makes a leaſe for life of his ſhare, this defeats the jointure [i]; for it deſtroys the unity both of title and of intereſt. And, whenever or by whatever means the jointure ceaſes or is ſevered, the right of ſurvivorſhip or *jus accreſcendi* the ſame inſtant ceaſes with it [k]. Yet, if one of three joint-tenants alienes his ſhare, the two remaining tenants ſtill hold their parts by joint-tenancy and ſurvivorſhip [l]: and, if one of three joint-tenants releaſes his ſhare to one of his companions, though the joint-tenancy is deſtroyed with regard to that part, yet the two remaining parts are ſtill held in jointure [m]; for they ſtill preſerve their original conſtituent unities. But when, by any act or event, different intereſts are created in the ſeveral parts of the eſtate, or they are held by different titles, or if merely the poſſeſſion is ſeparated; ſo that the tenants have no longer theſe four indiſpenſible properties, a ſameneſs of intereſt, and undivided poſſeſſion, a title veſting at one and the ſame time, and by one and the ſame act or grant; the jointure is inſtantly diſſolved.

[e] *Jus accreſcendi praefertur ultimae voluntati.* Co. Litt. 185.

[f] Litt. §. 287.

[g] Cro. Eliz. 470.

[h] 2 Rep. 60. Co. Litt. 182.

[i] Litt. §. 302, 303.

[k] *Nihil de re accreſcit ei, qui nihil in re quando jus accreſceret habet.* Co. Litt. 188.

[l] Litt. §. 294.

[m] *Ibid.* §. 304.

IN

IN general it is advantageous for the joint-tenants to diſſolve the jointure; ſince thereby the right of ſurvivorſhip is taken away, and each may tranſmit his own part to his own heirs. Sometimes however it is diſadvantageous to diſſolve the joint eſtate: as if there be joint-tenants for life, and they make partition, this diſſolves the jointure; and, though before they each of them had an eſtate in the whole for their own lives and the life of their companion, now they have an eſtate in a moiety only for their own lives merely; and, on the death of either, the reverſioner ſhall enter on his moiety [n]. And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture [o]: for in the firſt place, by the ſeverance of the jointure he has given himſelf in his own moiety only an eſtate for his own life; and then he grants the ſame land for the life of another: which grant, by a tenant for his own life merely, is a forfeiture of his eſtate [p]; for it is creating an eſtate which may by poſſibility laſt longer than that which he is legally entitled to.

III. AN eſtate held in *coparcenary* is where lands of inheritance deſcend from the anceſtor to two or more perſons. It *ariſes* either by common law, or particular cuſtom. By common law: as where a perſon ſeiſed in fee-ſimple or in fee-tail dies, and his next heirs are two or more females, his daughters, ſiſters, aunts, couſins, or their repreſentatives; in this caſe they ſhall all inherit, as will be more fully ſhewn, when we treat of deſcents hereafter: and theſe co-heirs are then called *coparceners*; or, for brevity, *parceners* only [q]. Parceners by particular cuſtom are where lands deſcend, as in gavelkind, to all the males in equal degree, as ſons, brothers, uncles, &c [r]. And, in either of theſe caſes, all the parceners put together make but one heir; and have but one eſtate among them [s].

[n] 1 Jones. 55.
[o] 4 Leon. 237.
[p] Co. Litt. 252.
[q] Litt. §. 241, 242.
[r] *Ibid.* §. 265.
[s] Co. Litt. 163.

THE

THE *properties* of parceners are in ſome reſpects like thoſe of joint-tenants; they having the ſame unities of *intereſt*, *title*, and *poſſeſſion*. They may ſue and be ſued jointly for matters relating to their own lands [t]: and the entry of one of them ſhall in ſome caſes enure as the entry of them all [u]. They cannot have an action of treſpaſs againſt each other: but herein they differ from joint-tenants, that they are alſo excluded from maintaining an action of waſte [w]; for coparceners could at all times put a ſtop to any waſte by writ of partition, but till the ſtatute of Henry the eighth joint-tenants had no ſuch power. Parceners alſo differ materially from joint-tenants in four other points: 1. They always claim by deſcent, whereas joint-tenants always claim by purchaſe. Therefore if two ſiſters purchaſe lands, to hold to them and their heirs, they are not parceners, but joint-tenants [x]: and hence it likewiſe follows, that no lands can be held in coparcenary, but eſtates of inheritance, which are of a deſcendible nature; whereas not only eſtates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* neceſſary to an eſtate in coparcenary. For if a man hath two daughters, to whom his eſtate deſcends in coparcenary, and one dies before the other; the ſurviving daughter and the heir of the other, or, when both are dead, their two heirs, are ſtill parceners [y]; the eſtates veſting in each of them at different times, though it be the ſame quantity of intereſt, and held by the ſame title. 3. Parceners, though they have an *unity*, have not an *entirety*, of intereſt. They are properly entitled each to the whole of a diſtinct moiety [z]; and of courſe there is no *jus accreſcendi*, or ſurvivorſhip between them: for each part deſcends ſeverally to their reſpective heirs, though the unity of poſſeſſion continues. And as long as the lands continue in a courſe of deſcent, and united in poſſeſſion, ſo long are the tenants therein, whether male or female, called parceners. But if

t Co. Litt. 164.
u *Ibid.* 188. 243.
w 2 Inſt. 403.
x Litt. §. 254.
y Co. Litt. 164. 174.
z *Ibid.* 163, 164.

the

the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common* [a].

PARCENERS are so called, saith Littleton [b], because they may be constrained to make *partition*. And he mentions many methods of making it [c]; four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to chuse some friend to make partition for them, and then the sisters shall chuse each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not chuse first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger [d]. And the reason given is that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall chuse last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in severalty [e]. But there are some things

a Litt. §. 309.

b §. 241.

c §. 243 to 264.

d Co. Litt. 166. 3 Rep. 22.

e By statute 8 & 9 W. III. c. 31. an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

 which

which are in their nature impartible. The manſion-houſe, common of eſtovers, common of piſcary uncertain, or any other common without ſtint, ſhall not be divided; but the eldeſt ſiſter, if ſhe pleaſes, ſhall have them, and make the others a reaſonable ſatisfaction in other parts of the inheritance: or, if that cannot be, then they ſhall have the profits of the thing by turns, in the ſame manner as they take the advowſon [f].

THERE is yet another conſideration attending the eſtate in coparcenary; that if one of the daughters has had an eſtate given with her in *frankmarriage* by her anceſtor, (which we may remember was a ſpecies of eſtates-tail, freely given by a relation for advancement of his kinſwoman in marriage [g]) in this caſe, if lands deſcend from the *ſame* anceſtor to her and her ſiſters in fee-ſimple, ſhe or her heirs ſhall have no ſhare of them, unleſs they will agree to divide the lands ſo given in frankmarriage in equal proportion with the reſt of the lands deſcending [h]. This mode of diviſion was known in the law of the Lombards [i]; which directs the woman ſo preferred in marriage, and claiming her ſhare of the inheritance, *mittere in confuſum cum ſororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing thoſe lands into *hotchpot* [k]: which term I ſhall explain in the very words of Littleton [l]: "it ſeemeth that this word, "*hotchpot*, is in Engliſh a pudding; for in a pudding is "not commonly put one thing alone, but one thing with "other things together." By this houſewifely metaphor our anceſtors meant to inform us [m], that the lands, both thoſe given in frankmarriage and thoſe deſcending in fee-ſimple, ſhould be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage; and if ſhe did not chuſe to put her lands into hotchpot, ſhe was preſumed to be ſufficiently

f Co. Litt. 164, 165.

g See pag. 115.

h Bracton. *l.* 2. *c.* 34. Litt. §. 266. to 273.

i *l.* 2. *t.* 14. *c.* 15.

k Britton. *c.* 72.

l §. 267.

m Litt. §. 268.

provided

provided for, and the reſt of the inheritance was divided among her other ſiſters. The law of hotchpot took place then only, when the other lands deſcending from the anceſtor were fee-ſimple; for if they deſcended in tail, the donee in frankmarriage was entitled to her ſhare, without bringing her lands ſo given into hotchpot [n]. And the reaſon is, becauſe lands deſcending in fee-ſimple are diſtributed by the policy of law, for the maintenance of all the daughters; and, if one has a ſufficient proviſion out of the ſame inheritance, equal to the reſt, it is not reaſonable that ſhe ſhould have more: but lands, deſcending in tail, are not diſtributed by the operation of the law, but by the deſignation of the giver, *per formam doni;* it matters not therefore how unequal this diſtribution may be. Alſo no lands, but ſuch as are given in frankmarriage, ſhall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion [o]. And therefore, as gifts in frankmarriage are fallen into diſuſe, I ſhould hardly have mentioned the law of hotchpot, had not this method of diviſion been revived and copied by the ſtatute for diſtribution of perſonal eſtates, which we ſhall hereafter conſider at large.

THE eſtate in coparcenary may be *diſſolved,* either by partition, which diſunites the poſſeſſion; by alienation of one parcener, which diſunites the title, and may diſunite the intereſt; or by the whole at laſt deſcending to and veſting in one ſingle perſon, which brings it to an eſtate in ſeveralty.

IV. TENANTS in *common* are ſuch as hold by ſeveral and diſtinct titles, but by unity of poſſeſſion; becauſe none knoweth his own ſeveralty, and therefore they all occupy promiſcuouſly [p]. This tenancy therefore happens, where there is a unity of poſſeſſion merely, but perhaps an entire diſunion of intereſt, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee-ſimple, the other in tail, or for life; ſo that there is no

[n] Litt. §. 274.
[o] *Ibid.* 275.
[p] *Ibid.* 292.

necеſſary

neceſſary unity of intereſt: one may hold by deſcent, the other by purchaſe; or the one by purchaſe from A, the other by purchaſe from B; ſo that there is no unity of title: one's eſtate may have been veſted fifty years, the other's but yeſterday; ſo there is no unity of time. The only unity there is, is that of poſſeſſion: and for this Littleton gives the true reaſon, becauſe no man can certainly tell which part is his own: otherwiſe even this would be ſoon deſtroyed.

TENANCY in common may be created, either by the deſtruction of the two other eſtates, in joint-tenancy and coparcenary, or by ſpecial limitation in a deed. By the deſtruction of the two other eſtates, I mean ſuch deſtruction as does not ſever the unity of poſſeſſion, but only the unity of title or intereſt: As, if one of two joint-tenants in fee alienes his eſtate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have ſeveral titles, the other joint-tenant by the original grant, the alienee by the new alienation [q]; and they alſo have ſeveral intereſts, the former joint-tenant in fee-ſimple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles, and conveyances [r]. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common [s]; becauſe they hold by different titles, the parcener by deſcent, the alienee by purchaſe. So likewiſe, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees ſhall be joint-tenants of the life-eſtate, but they ſhall have ſeveral inheritances; becauſe they cannot poſſibly have one heir of their two bodies, as might have been the caſe had the limitation been to *a man and woman*, and the heirs of their bodies begotten [t]: and in this, and the like caſes, their iſſues ſhall be tenants in common; becauſe they muſt claim by different titles, one as heir of A, and the other as heir of B; and thoſe too not titles by purchaſe,

[q] Litt. §. 293.
[r] *Ibid.* 295.
[s] *Ibid.* 309.
[t] *Ibid.* 283.

chase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A TENANCY in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in it's constructions to favour joint-tenancy rather than tenancy in common [u]; because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common [w]; and, if one grants to another *half* his land, the grantor and grantee are also tenants in common [x]: because, as has been before [y] observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally*, is said to be a joint-tenancy [z]; because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy [a], (for it implies no more than the law has annexed to that estate, *viz.* divisibility [b]) yet in *wills* it is certainly a tenancy in common [c]; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common

u Salk. 392.
w Litt. §. 298.
x *Ibid.* 299.
y See p. 182.
z Poph. 52.
a 1 Equ. Cas. abr. 291.
b 1 P. Wms. 17.
c 3 Rep. 39. 1 Ventr. 32.

is meant to be created, to add exprefs words of exclufion as well as defcription, and limit the eftate to A and B, to hold *as tenants in common, and not as joint-tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the ftatutes of Henry VIII and William III, before-mentioned [d], to make partition of their lands; which they were not at common law. They properly take by diftinct moieties, and have no entirety of intereft; and therefore there is no furvivorfhip between tenants in common. Their other incidents are fuch as merely arife from the unity of poffeffion; and are therefore the fame as appertain to joint-tenants merely upon that account: fuch as being liable to reciprocal actions of wafte, and of account, by the ftatutes of Weftm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the eftate [e]; though, if one actually turns the other out of poffeffion, an action of ejectment will lie againft him [f]. But, as for other incidents of joint-tenants, which arife from the privity of title, or the union and entirety of intereft, (fuch as joining or being joined in actions [g], unlefs in the cafe where fome entire or indivifible thing is to be recovered [h]) thefe are not applicable to tenants in common, whofe interefts are diftinct, and whofe titles are not joint but feveral.

ESTATES in common can only be *diffolved* two ways: 1. By uniting all the titles and interefts in one tenant, by purchafe or otherwife; which brings the whole to one feveralty: 2. By making partition between the feveral tenants in common, which gives them all refpective feveralties. For indeed tenancies in common differ in nothing from fole eftates, but merely in the blending and unity of poffeffion. And this finifhes our inquiries with refpect to the nature of *eftates.*

[d] pag. 185, & 189.
[e] Co. Litt. 199.
[f] *Ibid.* 200.
[g] Litt. §. 311.
[h] Co. Litt. 197.

CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein; I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

A TITLE is thus defined by sir Edward Coke [a], *titulus est justa causa possidendi id quod nostrum est*; or, it is the means whereby the owner of lands hath the just possession of his property.

THERE are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. THE lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprize turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of that actual seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or

[a] 1 Inst. 345.

after the death of a particular tenant and before the entry of him in remainder or reverſion, a ſtranger may contrive to get poſſeſſion of the vacant land, and hold out him that had a right to enter. In all which caſes, and many others that might be here ſuggeſted, the wrongdoer has only a mere naked poſſeſſion, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of theſe commentaries. But in the mean time, till ſome act be done by the rightful owner to deveſt this poſſeſſion and aſſert his title, ſuch actual poſſeſſion is, *prima facie*, evidence of a legal title in the poſſeſſor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeaſible title. And, at all events, without ſuch actual poſſeſſion no title can be completely good.

II. THE next ſtep to a good and perfect title is the *right of poſſeſſion*, which may reſide in one man, while the actual poſſeſſion is not in himſelf but in another. For if a man be diſſeiſed, or otherwiſe kept out of poſſeſſion, by any of the means before-mentioned, though the *actual* poſſeſſion be loſt, yet he has ſtill remaining in him the *right* of poſſeſſion; and may exert it whenever he thinks proper, by entering upon the diſſeiſor, and turning him out of that occupancy which he has ſo illegally gained. But this right of poſſeſſion is of two ſorts: an *apparent* right of poſſeſſion, which may be defeated by proving a better; and an *actual* right of poſſeſſion, which will ſtand the teſt againſt all opponents. Thus if the diſſeiſor, or other wrongdoer, dies poſſeſſed of the land whereof he ſo became ſeiſed by his own unlawful act, and the ſame deſcends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of poſſeſſion reſides in the perſon diſſeiſed; and it ſhall not be lawful for the perſon diſſeiſed to deveſt this apparent right by mere entry or other act of his own, but only by an action at law[b]: For, until the contrary be proved by legal demonſtration, the law will rather preſume the right to

[b] Litt. §. 385.

reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feodal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always upon the spot to perform the feodal duties and services [c]: and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; *viz.*

III. THE mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right, jus merum;* and the estate of the owner is in such cases said to be totally devested, and *put to a right* [d]. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession:

c Gilb. Ten. 18.

d Co. Litt. 345.

for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

THUS, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing

thing but the *mere right of property*. And even this right of property will fail, or at leaſt it will be without a remedy, unleſs I purſue it within the ſpace of ſixty years. So alſo if the father be tenant in tail, and alienes the eſtate-tail to a ſtranger in fee, the alienee thereby gains the *right of poſſeſſion*, and the ſon hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *poſſeſſion*, another the *right of poſſeſſion*, and a third the *right of property*. For if tenant in tail infeoffs A in fee-ſimple, and dies, and B diſſeiſes A; now B will have the *poſſeſſion*, A the *right of poſſeſſion*, and the iſſue in tail the *right of property*: A may recover the poſſeſſion againſt B; and afterwards the iſſue in tail may evict A, and unite in himſelf the poſſeſſion, the right of poſſeſſion, and alſo the right of property. In which union conſiſts,

IV. A COMPLETE title to lands, tenements, and hereditaments. For it is an ancient maxim of the law [e], that no title is completely good, unleſs the right of poſſeſſion be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit* [f]. And when to this double right the actual poſſeſſion is alſo united, when there is, according to the expreſſion of Fleta [g], *juris et ſeiſinae conjunctio*, then, and then only, is the title completely legal.

[e] Mirr. *l.* 2. *c.* 27.

[f] Co. Litt. 266. Bract. *l.* 5. *tr.* 3. *c.* 5.

[g] *l.* 3. *c.* 15. §. 5.

CHAPTER THE FOURTEENTH.

OF TITLE BY DESCENT.

THE ſeveral gradations and ſtages, requiſite to form a complete title to lands, tenements, and hereditaments, having been briefly ſtated in the preceding chapter, we are next to conſider the ſeveral manners, in which this complete title (and therein principally the right of *propriety*) may be reciprocally loſt and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we muſt firſt of all obſerve, that (as gain and loſs are terms of relation, and of a reciprocal nature) by whatever method one man gains an eſtate, by that ſame method or it's correlative ſome other man has loſt it. As where the heir acquires by deſcent, the anceſtor has firſt loſt or abandoned his eſtate by his death: where the lord gains land by eſcheat, the eſtate of the tenant is firſt of all loſt by the natural or legal extinction of all his hereditary blood: where a man gains an intereſt by occupancy, the former owner has previouſly relinquiſhed his right of poſſeſſion: where one man claims by preſcription or immemorial uſage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the ſupineneſs or neglect of himſelf and his anceſtors for ages: and ſo, in caſe of forfeiture, the tenant by his own miſbehaviour or neglect has renounced his intereſt in the eſtate; whereupon it devolves to that perſon who by law may take advantage of ſuch default: and, in alienation by common aſſurances, the two conſiderations of loſs and acquiſition are ſo

interwoven, and ſo conſtantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

THE methods therefore of acquiring on the one hand, and of loſing on the other, a title to eſtates in things real, are reduced by our law to two: *deſcent*, where the title is veſted in a man by the ſingle operation of law; and *purchaſe*, where the title is veſted in him by his own act or agreement [a].

DESCENT, or hereditary ſucceſſion, is the title whereby a man on the death of his anceſtor acquires his eſtate by right of repreſentation, as his heir at law. An heir therefore is he upon whom the law caſts the eſtate immediately on the death of the anceſtor: and an eſtate, ſo deſcending to the heir, is in law called the inheritance.

THE doctrine of deſcents, or law of inheritances in fee-ſimple, is a point of the higheſt importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchaſes, whereby the legal courſe of deſcents is broken and altered, perpetually refer to this ſettled law of inheritance, as a *datum* or firſt principle univerſally known, and upon which their ſubſequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly underſtood without a previous knowlege of the law of deſcents in fee-ſimple. One may well perceive that this is an eſtate confined in it's deſcent to ſuch heirs only of the donee, as have ſprung or ſhall ſpring from his body; but who thoſe heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldeſt, youngeſt, or other ſon alone, or all the ſons together, ſhall be his heir; this is a point, that we muſt reſult back to the ſtanding law of deſcents in fee-ſimple to be informed of.

[a] Co. Litt. 18.

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IN order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents, in those by *custom*, *statute*, and *common law*: for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often [b] hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by *statute*, or fees-tail *per formam doni*, in pursuance of the statute of Westminster the second, have also been already [c] copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the orignal donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

AND, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood [d].

CONSANGUINITY, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite* "*descendentium*;" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

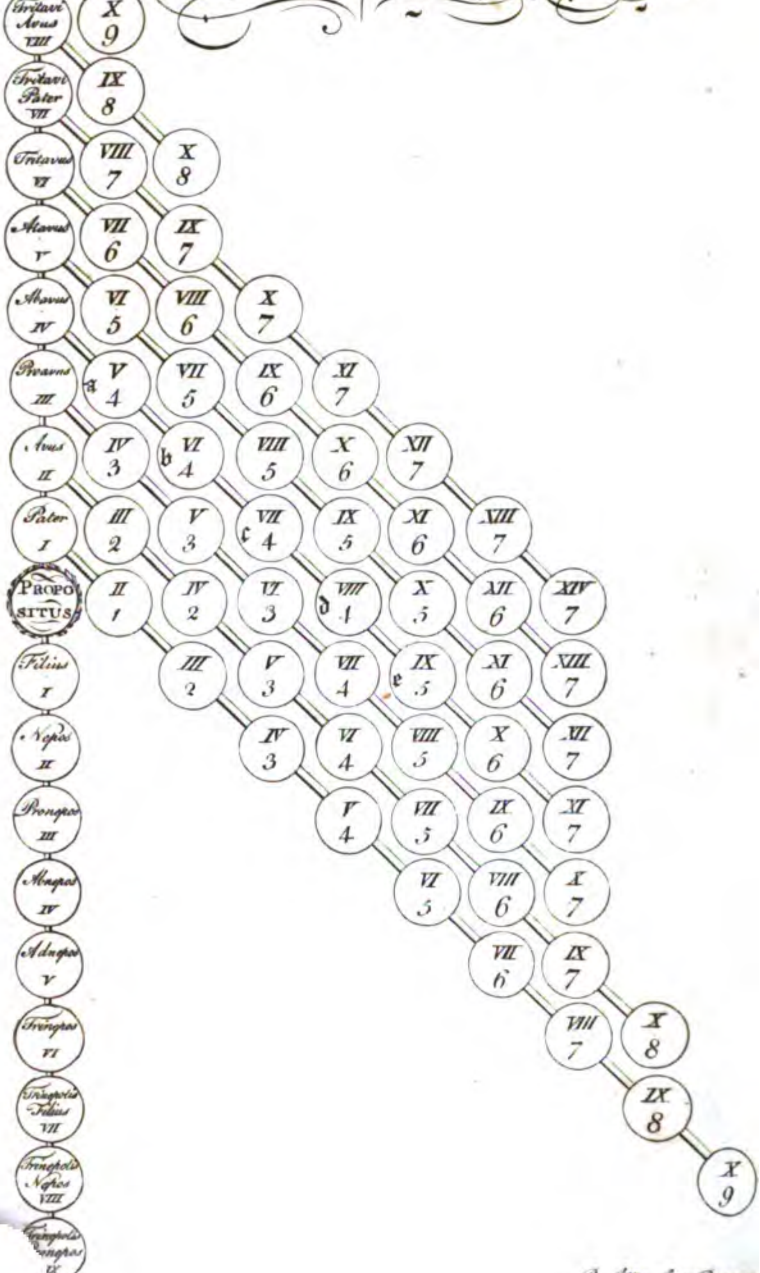
b See Vol. I. pag. 74, 75. Vol. II. pag. 83. 85.

c See pag. 112, *&c.*

d For a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of it's nature, see *an essay on collateral consanguinity*. (Law tracts, *Oxon.* 1762. 8vo. or 1771, 4to.)

LINEAL

Table of Consanguinity



LINEAL consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil [e], and canon [f], as in the common law [g].

THE doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees: and so many different bloods [h] is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate [i]. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum persona-rum*

e *Ff.* 38. 10. 10.

f *Decretal. l.* 4. *tit.* 14.

g Co. Litt. 23.

h *Ibid.* 12.

i This will seem surprising to those who are unacquainted with the encreasing power of progressive numbers: but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also

rum ab eodem ſtipite deſcendentium; ſince lineal relations are ſuch as deſcend one from the other, and both of courſe from the ſame common anceſtor.

COLLATERAL kindred anſwers to the ſame deſcription: collateral relations agreeing with the lineal in this, that they deſcend from the ſame ſtock or anceſtor; but differing in this, that they do not deſcend one from the other. Collateral kinſmen are ſuch then as lineally ſpring from one and the ſame anceſtor, who is the *ſtirps*, or root, the *ſtipes*, trunk, or common ſtock, from whence theſe relations are branched out. As if John Stiles hath two ſons, who have

alſo 2: or, to ſpeak more intelligibly, it is evident, for that each of us has two anceſtors in the firſt degree; the number of whom is doubled at every remove, becauſe each of our anceſtors has alſo two immediate anceſtors of his own.

Lineal Degrees.	*Number of Anceſtors.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A ſhorter method of finding the number of anceſtors at any even degree is by ſquaring the number of anceſtors at half that number of degrees. Thus 16 (the number of anceſtors at four degrees) is the ſquare of 4, the number of anceſtors at two; 256 is the ſquare of 16; 65536 of 256; and the number of anceſtors at 40 degrees would be the ſquare of 1048576, or upwards of a million millions.

each

each a numerous iſſue; both theſe iſſues are lineally deſcended from John Stiles as their common anceſtor; and they are collateral kinſmen to each other, becauſe they are all deſcended from this common anceſtor, and all have a portion of his blood in their veins, which denominates them *conſanguineos*.

WE muſt be careful to remember, that the very being of collateral conſanguinity conſiſts in this deſcent from one and the ſame common anceſtor. Thus *Titius* and his brother are related; why? becauſe both are derived from one father: *Titius* and his firſt couſin are related; why? becauſe both deſcend from the ſame grandfather; and his ſecond couſin's claim to conſanguinity is this, that they both are derived from one and the ſame great-grandfather. In ſhort, as many anceſtors as a man has, ſo many common ſtocks he has, from which collateral kinſmen may be derived. And as we are taught by holy writ, that there is one couple of anceſtors belonging to us all, from whom the whole race of mankind is deſcended, the obvious and undeniable conſequence is, that all men are in ſome degree related to each other. For indeed, if we only ſuppoſe each couple of our anceſtors to have left, one with another, two children; and each of thoſe children on an average to have left two more; (and, without ſuch a ſuppoſition, the human ſpecies muſt be daily diminiſhing) we ſhall find that all of us have now ſubſiſting near two hundred and ſeventy millions of kindred in the fifteenth degree, at the ſame diſtance from the ſeveral common anceſtors as ourſelves are; beſides thoſe that are one or two deſcents nearer to or farther from the common ſtock, who may amount to as many more [k]. And, if this calculation ſhould appear incompatible with the number of inhabitants on the earth, it is becauſe, by intermarriages among the ſeveral deſcendants from the ſame anceſtor, a hundred or a thouſand modes of conſanguinity may be conſolidated in one perſon, or he may be related to us a hundred or a thouſand different ways.

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[k] This will ſwell more conſiderably than the former calculation; for here, though the firſt term is but 1, the denominator is 4; that is, there is *one* kinſman (a brother) in the firſt degree, who makes, together with the *propoſitus*, the two deſcendants from the firſt couple of anceſtors; and in every other degree the

THE method of computing these degrees in the canon law [l], which our law has adopted [m], is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the de-

the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who encrease in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants encrease downwards, must be double to that in which the ancestors encrease upwards: but we have seen that the ancestors encrease upwards in a duplicate *ratio*: therefore the descendants must encrease downwards in a double duplicate, that is, in a quadruple, *ratio*.

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number, of ancestors at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; it's half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowlege, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

l *Decretal.* 4. 14. 3 & 9.

m Co. Litt. 23.

gree

gree in which they are related to each other. Thus *Titius* and his brother are related in the firſt degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the ſecond degree; for the nephew is two degrees removed from the common anceſtor; *viz.* his own grandfather, the father of *Titius*. Or, (to give a more illuſtrious inſtance from our Engliſh annals) King Henry the ſeventh, who ſlew Richard the third in the battle of Boſworth, was related to that prince in the fifth degree. Let the *propoſitus* therefore in the table of conſanguinity repreſent king Richard the third, and the claſs marked (e) king Henry the ſeventh. Now their common ſtock or anceſtor was king Edward the third, the *abavus* in the ſame table: from him to Edmond duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propoſitus*, four: and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerſet (b) two; to John duke of Somerſet (c) three; to Margaret counteſs of Richmond (d) four; to king Henry the ſeventh (e) five. Which laſt mentioned prince, being the fartheſt removed from the common ſtock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the perſons related, to the common ſtock, and then downwards again to the other; reckoning a degree for each perſon both aſcending and deſcending) theſe two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common anceſtor, four; to John of Gant, five; to John earl of Somerſet, ſix; to John duke of Somerſet, ſeven; to Margaret counteſs of Richmond, eight; to king Henry the ſeventh, nine [n].

[n] See the table of conſanguinity annexed; wherein all the degrees of collateral kindred to the *propoſitus* are computed, ſo far as the tenth of the civilians and the ſeventh of the canoniſts incluſive; the former being diſtinguiſhed by the numeral letters, the latter by the common cyphers.

THE nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. THE first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. Heirs presumptive are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son [a].

[a] Bro. *tit. descent.* 58.

WE must also remember, that no person can be properly such an anceſtor, as that an inheritance of lands or tenements can be derived from him, unleſs he hath had actual ſeiſin of ſuch lands, either by his own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or by receiving rent from a leſſee of the freehold [p]: or unleſs he hath had what is equivalent to corporal ſeiſin in hereditaments that are incorporeal; ſuch as the receipt of rent, a preſentation to the church in caſe of an advowſon [q], and the like. But he ſhall not be accounted an anceſtor, who hath had only a bare right or title to enter or be otherwiſe ſeiſed. And therefore all the caſes, which will be mentioned in the preſent chapter, are upon the ſuppoſition that the deceaſed (whoſe inheritance is now claimed) was the laſt perſon actually ſeiſed thereof. For the law requires this notoriety of poſſeſſion, as evidence that the anceſtor had that property in himſelf, which is now to be tranſmitted to his heir. Which notoriety had ſucceeded in the place of the antient feodal inveſtiture, whereby, while feuds were precarious, the vaſal on the deſcent of lands was formerly admitted in the lord's court (as is ſtill the practice in Scotland) and there received his ſeiſin, in the nature of a renewal of his anceſtor's grant, in the preſence of the feodal peers: till at length, when the right of ſucceſſion became indefeaſible, an entry on any part of the lands within the county (which if diſputed was afterwards to be tried by thoſe peers) or other notorious poſſeſſion, was admitted as equivalent to the formal grant of ſeiſin, and made the tenant capable of tranſmitting his eſtate by deſcent. The ſeiſin therefore of any perſon, thus underſtood, makes him the root or ſtock, from which all future inheritance by right of blood muſt be derived: which is very briefly expreſſed in this maxim, *ſeiſina facit ſtipitem* [r].

p Co. Litt. 15.
q *Ibid.* 11.
r Flet. *l.* 6. *c.* 2. §. 2.

WHEN therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord [s].

THIS rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother [t]. And, by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters [v]; though by the law of the twelves tables the mother was originally, on account of her sex, excluded [u]. Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice [w]. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

[s] Litt. §. 3.

[t] Selden. *de succ. Ebraeor.* c. 12.

[v] *Ff.* 38. 15. 1. *Nov.* 118. 127.

[u] *Inst.* 3. 3. 1.

[w] Craig. *de jur. feud.* l. 2. t. 13. §. 15. Locke on gov. part 1. §. 90.

WE

WE are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seised by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

IF we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law [x], that *successionis feudi talis est natura, quod ascendentes non succedunt;* and therefore the same maxim obtains also in the French law to this day [y]. Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line [z]: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law [a], that *haereditas nunquam ascendit;* which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and, taken in that light, there are some arguments in it's favour, besides those which are drawn

x 2 *Feud.* 50.

y Domat. *p.* 2. *l.* 2. *t.* 2. Montesq. *Esp. L. l.* 31. *c.* 33.

z *LL. Hen. I. c.* 70.

a *l.* 7. *c.* 1.

ter or laws of king Henry the firſt, it is not (like many Norman innovations) given up, but rather enforced [m]. The true reaſon of preferring the males muſt be deduced from feodal principles: for, by the genuine and original policy of that conſtitution, no female could ever ſucceed to a proper feud [n], inaſmuch as they were incapable of performing thoſe military ſervices, for the ſake of which that ſyſtem was eſtabliſhed. But our law does not extend to a total excluſion of females, as the Salic law, and others, where feuds were moſt ſtrictly retained: it only poſtpones them to males; for, though daughters are excluded by ſons, yet they ſucceed before any collateral relations: our law, like that of the Saxon feudiſts before-mentioned, thus ſteering a middle courſe, between the abſolute rejection of females, and the putting them on a footing with males.

III. A THIRD rule, or canon of deſcent, is this; that where there are two or more males in equal degree, the eldeſt only ſhall inherit; but the females all together.

As if a man hath two ſons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of Gilbert the ſecond ſon and both the daughters; but, if both the ſons die without iſſue before the father, the daughters Margaret and Charlotte ſhall both inherit the eſtate as coparceners [o].

THIS right of primogeniture in males ſeems antiently to have only obtained among the Jews, in whoſe conſtitution the eldeſt ſon had a double portion of the inheritance [p]; in the ſame manner as with us, by the laws of king Henry the firſt [q], the eldeſt ſon had the capital fee or principal feud of his father's poſſeſſions, and no other pre-eminence; and

[m] *c.* 70.
[n] 1 *Feud.* 8.
[o] Litt. §. 5. Hale. H. C. L. 238.
[p] Selden. *de ſucc. Ebr.* *c.* 5.
[q] *c.* 70.

as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary [r]. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible [s], or (as they stiled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniencies that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments [t]. These reasons occasioned an almost total change in the method of feodal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feodal constitution was established in England by William the conqueror.

YET we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil [u] wrote, in the reign of Henry the second; and it is mentioned in the mirror [w] as a part of our antient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However in Henry the third's time we find by Bracton [x] that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands:

r Glanvil. *l.* 7. *c.* 3.
s 2 *Feud.* 55.
t Hale. H. C. L. 221.
u *l.* 7. *c.* 3.
w *c.* 1. §. 3.
x *l.* 2. *c.* 30, 31.

except in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons [y]; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the antient law: for they were all equally incapable of performing any personal service; and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown [z]; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspence or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases [a]. In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—"*progressum est, ut* "*ad filios deveniret, in quem scilicet dominus hoc vellet beneficium* "*confirmare*.[b]"

IV. A FOURTH rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased

y Somner. Gavelk. 7.

z Co. Litt. 165.

a *Ibid.*

b 1 *Feud.* 1.

shall

shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

THUS the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*[c]. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles the father of the two sisters dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece,

THIS taking by representation is called succession *in stirpes* according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed[d]; but the Roman somewhat differed from it. In the descending line the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as if one of three daughters died, leaving ten children, and then the father died: the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting, (as if the deceased left one brother, and two nephews the sons of another brother) the succession was still guided by the *roots*: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals,

c Hale. H. C. L. 236, 237. d Selden. *de succ. Ebr. c.* 1.

and

and ſhared the inheritance *per capita*, that is, ſhare and ſhare alike; they being themſelves now the next in degree to the anceſtor, in their own right, and not by right of repreſentation [e]. So, if the next heirs of *Titius* be ſix nieces, three by one ſiſter, two by another, and one by a third; his inheritance by the Roman law was divided into ſix parts, and one given to each of the nieces: whereas the law of England in this caſe would ſtill divide it only into three parts, and diſtribute it *per ſtirpes*, thus; one third to the three children who repreſent one ſiſter, another third to the two who repreſent the ſecond, and the remaining third to the one child who is the ſole repreſentative of her mother.

THIS mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſtborn among the males, to both which the Roman law is a ſtranger. For if all the children of three ſiſters were in England to claim *per capita*, in their own right as next of kin to the anceſtor, without any reſpect to the ſtocks from whence they ſprung, and thoſe children were partly male and partly female; then the eldeſt male among them would exclude not only his own brethren and ſiſters, but all the iſſue of the other two daughters; or elſe the law in this inſtance muſt be inconſiſtent with itſelf, and depart from the preference which it conſtantly gives to the males, and the firſtborn, among perſons in equal degree. Whereas, by dividing the inheritance according to the roots, or *ſtirpes*, the rule of deſcent is kept uniform and ſteady: the iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the ſame: and among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males and the ſame right of primogeniture obtain, as would have obtained at the firſt among the roots themſelves, the ſons or daughters of the deceaſed. As if a man hath two ſons, A and B, and A dies leaving two

e *Nov.* 110. *c.* 3. *Inſt.* 3. 1. 6.

ſons,

ſons, and then the grandfather dies; now the eldeſt ſon of A ſhall ſucceed to the whole of his grandfather's eſtate: and if A had left only two daughters, they ſhould have ſucceeded alſo to equal moieties of the whole, in excluſion of B and his iſſue. But if a man hath only three daughters, C, D, and E; and C dies leaving two ſons, D leaving two daughters, and E leaving a daughter and a ſon who is younger than his ſiſter: here when the grandfather dies, the eldeſt ſon of C ſhall ſucceed to one third, in excluſion of the younger; the two daughters of D to another third in partnerſhip; and the ſon of E to the remaining third, in excluſion of his elder ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downwards *in infinitum*.

YET this right does not appear to have been thoroughly eſtabliſhed in the time of Henry the ſecond, when Glanvil wrote: and therefore, in the title to the crown eſpecially, we find frequent conteſts between the younger (but ſurviving) brother and his nephew (being the ſon and repreſentative of the elder deceaſed) in regard to the inheritance of their common anceſtor: for the uncle is certainly nearer of kin to the common ſtock, by one degree, than the nephew; though the nephew, by repreſenting his father, has in him the right of primogeniture. The uncle alſo was uſually better able to perform the ſervices of the fief; and beſides had frequently ſuperior intereſt and ſtrength, to back his pretenſions and cruſh the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of repreſentative primogeniture; that is, the younger ſurviving brother is admitted to the inheritance before the ſon of an elder deceaſed: which occaſioned the diſputes between the two houſes of Mecklenburg, Schwerin and Strelitz, in 1692[f]. Yet Glanvil, with us, even in the twelfth century, ſeems[g] to declare for the right of the nephew by repreſentation; provided the eldeſt ſon had not received a proviſion in lands from his father, (or as the civil law would call it) had not been foris-

f Mod. Un. Hiſt. xlii. 334.   g *l.* 7. *c.* 3.

familiated,

familiated, in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm [h]: but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down [i], and so it has continued ever since. And thus much for lineal descents.

V. A FIFTH rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchasor; subject to the three preceding rules.

THUS if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family [k]. The first purchasor, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

THIS is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate: but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy [l] agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

WHEN feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is lineally descended

h Hale. H. C. L. 217. 229.

i Bracton. *l.* 2. *c.* 30. §. 2.

k Co. Litt. 12.

l *Gr. Coustum.* *c.* 25.

ſcended from, the firſt feudatory or purchaſor. In conſequence whereof, if a vaſal died ſeiſed of a feud of his own acquiring, or *feudum novum*, it could not deſcend to any but his own offspring; no, not even to his brother, becauſe he was not deſcended, nor derived his blood, from the firſt acquirer. But if it was *feudum antiquum*, that is, one deſcended to the vaſal from his anceſtors, then his brother, or ſuch other collateral relation as was deſcended and derived his blood from the firſt feudatory, might ſucceed to ſuch inheritance. To this purpoſe ſpeaks the following rule; "*frater* "*fratri, ſine legitimo haerede defuncto, in beneficio quod eorum* "*patris fuit ſuccedat: ſin autem unus e fratribus a domino feu-* "*dum acceperit, eo defuncto ſine legitimo haerede, frater ejus in* "*feudum non ſuccedit* [m]." The true feodal reaſon for which rule was this; that what was given to a man, for his perſonal ſervice and perſonal merit, ought not to deſcend to any but the heirs of his perſon. And therefore, as in eſtates-tail, (which a proper feud very much reſembled) ſo in the feodal donation, "*nomen haeredis, in prima inveſtitura expreſſum,* "*tantum ad deſcendentes ex corpore primi vaſalli extenditur; et* "*non ad collaterales, niſi ex corpore primi vaſalli ſive ſtipitis* "*deſcendant* [n]:" the will of the donor, or original lord, (when feuds were turned from life eſtates into inheritances) not being to make them abſolutely hereditary, like the Roman *allodium*, but hereditary only *ſub modo;* not hereditary to the collateral relations, or lineal anceſtors, or huſband, or wife of the feudatory, but to the iſſue deſcended from his body only.

HOWEVER, in proceſs of time, when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum;* that is, with all the qualities annexed of a feud derived from his anceſtors; and then the collateral relations were admitted to ſucceed even *in infinitum*, becauſe they might have been of the blood of, that is deſcended from, the firſt imaginary purchaſor. For

m 1 *Feud.* 1. §. 2.

n Crag. *l.* 1. *t.* 9. §. 36.

ſince it is not aſcertained in ſuch general grants, whether this feud ſhall be held *ut feudum paternum* or *feudum avitum*, but *ut feudum antiquum* merely; as a feud of indefinite antiquity; that is, ſince it is not aſcertained from which of the anceſtors of the grantee this feud ſhall be ſuppoſed to have deſcended; the law will not aſcertain it, but will ſuppoſe *any* of his anceſtors, *pro re nàta*, to have been the firſt purchaſor: and therefore it admits *any* of his collateral kindred (who have the other neceſſary requiſites) to the inheritance, becauſe every collateral kinſman muſt be deſcended from ſome one of his lineal anceſtors.

OF this nature are all the grants of fee-ſimple eſtates of this kingdom; for there is now in the law of England no ſuch thing as a grant of a *feudum novum*, to be held *ut novum*: unleſs in the caſe of a fee-tail, and there we ſee that this rule is ſtrictly obſerved, and none but the lineal deſcendants of the firſt donee (or purchaſor) are admitted; but every grant of lands in fee-ſimple is with us a *feudum novum* to be held *ut antiquum*, as a feud whoſe antiquity is indefinite: and therefore the collateral kindred of the grantee, or deſcendants from any of his lineal anceſtors, by whom the lands might have poſſibly been purchaſed, are capable of being called to the inheritance.

YET, when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, the ſtrict rule of the feodal law is ſtill obſerved; and none are admitted, but the heirs of thoſe through whom the inheritance hath paſſed: for all others have demonſtrably none of the blood of the firſt purchaſor in them, and therefore ſhall never ſucceed. As, if lands come to John Stiles by deſcent from his mother Lucy Baker, no relation of his father (as ſuch) ſhall ever be his heir of theſe lands; and, *vice verſa*, if they deſcended from his father Geoffrey Stiles, no relation of his mother (as ſuch) ſhall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any ſhare of his father's blood. And ſo, if the eſtate deſcended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, ſhall for the ſame reaſon never be admitted, but only thoſe of his father's father. This

is alſo the rule of the French law [o], which is derived from the ſame feodal fountain.

HERE we may obſerve, that ſo far as the feud is really *antiquum*, the law traces it back, and will not ſuffer any to inherit but the blood of thoſe anceſtors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Chriſtian Smith, or if it appear that his grandfather was the firſt grantee, and ſo took it (by the general law) as a feud of indefinite antiquity; in either of theſe caſes the law admits the deſcendants of any anceſtor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this eſtate: becauſe in the firſt caſe it is really uncertain, and in the ſecond caſe it is ſuppoſed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

THIS then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of iſſue in the laſt proprietor, the eſtate ſhall deſcend to the blood of the firſt purchaſor; or, that it ſhall reſult back to the heirs of the body of that anceſtor, from whom it either really has, or is ſuppoſed by fiction of law to have originally deſcended: according to the rule laid down in the year books [p], Fitzherbert [q], Brook [r], and Hale [s], "that he who "would have been heir to the father of the deceaſed" (and, of courſe, to the mother, or any other real or ſuppoſed purchaſing anceſtor) "ſhall alſo be heir to the ſon;" a maxim, that will hold univerſally, except in the caſe of a brother or ſiſter of the half blood, which exception (as we ſhall ſee hereafter) depends upon very ſpecial grounds.

THE rules of inheritance that remain are only rules of evidence, calculated to inveſtigate who the purchaſing anceſtor was; which *in feudis vere antiquis* has in proceſs of time been

o Domat. *part* 2. *pr.*
p *M.* 12 *Edw. IV.* 14.
q *Abr. t. diſcent.* 2.
r *Ibid.* 38.
s H. C. L. 243.

forgotten,

forgotten, and is supposed so to be in feuds that are held *ut antiquis*.

VI. A SIXTH rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

FIRST, he must be his next collateral kinsman, either personally or *jure representationis*; which proximity is reckoned according to the canonical degrees of consanguinity before-mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great nephew but also his first cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor, (the father of the *propositus*) and therefore deriving only one fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor, (the grandfather of each) and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in view as the civil, it may seem as if it ought to proceed according to the

civil

civil computation. But as it alſo reſpects the purchaſing anceſtor, from whom the eſtate was derived, it therein reſembles the canon law, and therefore counts it's degrees in the ſame manner. Indeed the deſignation of perſon, in ſeeking for the next of kin, will come to exactly the ſame end (though the degrees will be differently numbered) whichever method of computation we ſuppoſe the law of England to uſe; ſince the right of repreſentation, of the parent by the iſſue, is allowed to prevail *in infinitum*. This allowance was abſolutely neceſſary, elſe there would have frequently been many claimants in exactly the ſame degree of kindred, as (for inſtance) uncles and nephews of the deceaſed; which multiplicity, though no material inconvenience in the Roman law of partible inheritances, yet would have been productive of endleſs confuſion where the right of ſole ſucceſſion, as with us, is eſtabliſhed. The iſſue or deſcendants therefore of John Stiles's brother are all of them in the firſt degree of kindred with reſpect to inheritances, thoſe of his uncle in the ſecond, and thoſe of his great uncle in the third; as their reſpective anceſtors, if living, would have been; and are ſeverally called to the ſucceſſion in right of ſuch their repreſentative proximity.

THE right of repreſentation being thus eſtabliſhed, the former part of the preſent rule amounts to this; that, on failure of iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the other ſubſiſting iſſue of his next immediate anceſtor. Thus, if John Stiles dies without iſſue, his eſtate ſhall deſcend to Francis his brother, or his repreſentatives; he being lineally deſcended from Geoffrey Stiles, John's next immediate anceſtor, or father. On failure of brethren, or ſiſters, and their iſſue, it ſhall deſcend to the uncle of John Stiles, the lineal deſcendant of his grandfather George, and ſo on *in infinitum*. Very ſimilar to which was the law of inheritance among the antient Germans, our progenitors: "*haeredes ſucceſſoreſque, ſui cuique liberi, et nullum teſtamentum: ſi liberi non ſunt, proximus gradus in poſſeſſione, fratres, patrui, avunculi* [t]."

[t] Tacitus *de mor. Germ.* 21.

Now here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours[u], the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, *&c*, but in right of representation, as the offspring of the father, grandfather, *&c*, of the deceased[w]. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother or his representatives *to* or *through* another, without mentioning their common father[x]. If Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; *viz.* as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood: and therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards *in infinitum*; till some couple of ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, primogeniture,

u Numb. c. 27.

w Selden. *de succ. Ebr.* c. 12.

x 1 Sid. 196. 1 Ventr. 423. 1 Lev. 60. 12 Mod. 619.

and reprefentation, that have before been laid down with regard to lineal defcents from the perfon of the laft proprietor.

BUT, fecondly, the heir need not be the neareft kinfman abfolutely, but only *fub modo;* that is, he muft be the neareft kinfman of the *whole* blood; for, if there be a much nearer kinfman of the *half* blood, a diftant kinfman of the whole blood fhall be admitted, and the other entirely excluded: nay, the eftate fhall efcheat to the lord, fooner than the half blood fhall inherit.

A KINSMAN of the whole blood is he that is derived, not only from the fame anceftor, but from the fame couple of anceftors. For, as every man's own blood is compounded of the bloods of his refpective anceftors, he only is properly of the whole or entire blood with another, who hath (fo far as the diftance of degrees will permit) all the fame ingredients in the compofition of his blood that the other hath. Thus, the blood of John Stiles being compofed of thofe of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being defcended from both the fame parents, hath entirely the fame blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a fecond hufband, Lewis Gay, and hath iffue by him; the blood of this iffue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (inftead of Geoffrey Stiles) on the other part, it hath therefore only half the fame ingredients with that of John Stiles; fo that he is only his brother of the half blood, and for that reafon they fhall never inherit to each other. So alfo, if the father has two fons, A and B, by different venters or wives; now thefe two brethren are not brethren of the whole blood, and therefore fhall never inherit to each other, but the eftate fhall rather efcheat to the lord. Nay, even if the father dies, and his lands defcend to his eldeft fon A, who enters thereon, and dies feifed without iffue; ftill B fhall not be heir to this eftate, becaufe he is only of the half blood to A, the perfon laft feifed: but it fhall defcend to a fifter (if any) of the whole blood to A: for in fuch cafes the maxim is, that the feifin or *poffeffio fratris facit*

cit sororem esse haeredem. Yet, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised [y].

THIS total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchasor, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchasor, and thereby the proof of an actual descent from him became impossible; then the law substituted what sir Martin Wright [z] calls a *reasonable*, in the stead of an *impossible*, proof: for it remits the proof of an actual descent from the first purchasor; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession; (or derived from the same couple of ancestors) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchasor. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchasor.

y Hale. H. C. L. 238.

z Tenures 186.

To illustrate this by example. Let there be John Stiles, and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchasor, as *to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

AND, as this is the case *in feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case *in feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction, that brethren of purchasors (whether of the whole or half blood) are entitled to inherit at all: for we have seen that *in feudis stricte novis* neither brethren nor any other col-

laterals were admitted. As therefore *in feudis antiquis* we have ſeen the reaſonableneſs of excluding the half blood, if by a fiction of law a *feudum novum* be made deſcendible to collaterals as if it was *feudum antiquum*, it is juſt and equitable that it ſhould be ſubject to the ſame reſtrictions as well as the ſame latitude of deſcent.

PERHAPS by this time the excluſion of the half blood does not appear altogether ſo unreaſonable as at firſt ſight it is apt to do. It is certainly a very fine-ſpun and ſubtle nicety: but, conſidering the principles upon which our law is founded, it is not an injuſtice, nor always a hardſhip; ſince even the ſucceſſion of the whole blood was originally a beneficial indulgence, rather than the ſtrict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could poſſibly have enjoyed before. The doctrine of the whole blood was calculated to ſupply the frequent impoſſibility of proving a deſcent from the firſt purchaſor, without ſome proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpoſe it anſwers, for the moſt part, effectually enough. I ſpeak with theſe reſtrictions, becauſe it does not, neither can any other method, anſwer this purpoſe entirely. For though all the anceſtors of John Stiles, above the common ſtock, are alſo the anceſtors of his collateral kinſman of the whole blood; yet, unleſs that common ſtock be in the firſt degree, (that is, unleſs they have the ſame father and mother) there will be intermediate anceſtors below the common ſtock, that belong to either of them reſpectively, from which the other is not deſcended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other anceſtors, than what are in common to them both; yet with regard to his uncle, where the common ſtock is removed one degree higher, (that is, the grandfather and grandmother) one half of John's anceſtors will not be the anceſtors of his uncle: his *patruus*, or father's brother, derives not his deſcent from John's maternal anceſtors; nor his *avunculus*, or mother's brother, from thoſe in the paternal line. Here then

the

the ſupply of proof is deficient, and by no means amounts to a certainty: and the higher the common ſtock is removed, the more will even the probability decreaſe. But it muſt be obſerved, that (upon the ſame principles of calculation) the half blood have always a much leſs chance to be deſcended from an unknown indefinite anceſtor of the deceaſed, than the whole blood in the ſame degree. As, in the firſt degree, the whole brother of John Stiles is ſure to be deſcended from that unknown anceſtor; his half brother has only an even chance, for half John's anceſtors are not his. So, in the ſecond degree, John's uncle of the whole blood has an even chance; but the chances are three to one againſt his uncle of the half blood, for three-fourths of John's anceſtors are not his. In like manner, in the third degree, the chances are only three to one againſt John's great uncle of the whole blood, but they are ſeven to one againſt his great uncle of the half blood, for ſeven-eights of John's anceſtors have no connexion in blood with him. Therefore the much leſs probability of the half blood's deſcent from the firſt purchaſor, compared with that of the whole blood, in the ſeveral degrees, has occaſioned a general excluſion of the half blood in all.

BUT, while I thus illuſtrate the reaſon of excluding the half blood in general, I muſt be impartial enough to own, that, in ſome inſtances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a kinſman of the whole blood in a remoter degree, as the uncle or great uncle, is preferred to one of the half blood in a nearer degree, as the brother: for the half brother hath the ſame chance of being deſcended from the purchaſing anceſtor as the uncle; and a thrice better chance than the great uncle, or kinſman in the third degree. It is alſo more eſpecially overſtrained, when a man has two ſons by different venters, and the eſtate on his death deſcends from him to the eldeſt, who enters, and dies without iſſue; in which caſe the younger ſon cannot inherit this eſtate, becauſe he is not of the whole blood to the laſt proprietor [z]. This, it muſt be owned,

[z] A ſtill harder caſe than this happened *M.* 10 *Edw. III.* On the death of a man, who had three daughters by a firſt wife, and a fourth by another, his lands deſcended equally to all four as coparceners. Afterwards the two eldeſt died

owned, carries a hardſhip with it, even upon feodal principles: for the rule was introduced only to ſupply the proof of a deſcent from the firſt purchaſor; but here, as this eſtate notoriouſly deſcended from the father, and as both the brothers confeſſedly ſprung from him, it is demonſtrable that the half brother muſt be of the blood of the firſt purchaſor, who was either the father or ſome of the father's anceſtors. When therefore there is actual demonſtration of the thing to be proved, it is hard to exclude a man by a rule ſubſtituted to ſupply that proof when deficient. So far as the inheritance can be evidently traced back, there ſeems no need of calling in this preſumptive proof, this rule of probability, to inveſtigate what is already certain. Had the elder brother indeed been a purchaſor, there would have been no hardſhip at all, for the reaſons already given: or had the *frater uterinus* only, or brother by the mother's ſide, been excluded from an inheritance which deſcended from the father, it had been highly reaſonable.

INDEED it is this very inſtance, of excluding a *frater conſanguineus*, or brother by the father's ſide, from an inheritance which deſcended *a patre*, that Craig [b] has ſingled out, on which to ground his ſtrictures on the Engliſh law of half blood. And, really, it ſhould ſeem as if originally the cuſtom of excluding the half blood in Normandy [c] extended only to exclude a *frater uterinus*, when the inheritance deſcended *a patre*, and *vice verſa*: and poſſibly in England alſo; as even with us it remained a doubt, in the time of Bracton [d], and of Fleta [e], whether the half blood on the father's ſide was excluded from the inheritance which originally deſcended from the common father, or only from ſuch as deſcended from the reſpective mothers, and from newly purchaſed lands. So alſo the rule of law, as laid

died without iſſue; and it was held, that the third daughter alone ſhould inherit their ſhares, as being their heir of the whole blood; and that the youngeſt daughter ſhould remain only her original fourth part of their common father's lands. (10 *Aſſ* 27.) And yet it was clear law in *M.* 10 *Edw. II.* that, where lands had deſcended to two ſiſters of the half blood, as coparceners, each might be heir of thoſe lands to the other. (Mayn. Edw. II. 628. Fitzh. *abr. tit. quare impedit.* 177.)

b *l.* 2. *c.* 10. §. 14.

c *Gr. Couſtum. c.* 25.

d *l.* 2. *c.* 30. §. 3.

e *l.* 6. *c.* 1. §. 14.

down by our Fortescue [f], extends no farther than this; *frater fratri uterino non succedet in haereditate paterna.* It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign [g], so that it be the blood of the first monarch, purchasor, (or in the feodal language) conqueror of the reigning family. Thus it actually did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by act of parliament [h]) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent [i]: because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from it's own proper ancestor, and, in cases of new-purchased lands or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long established rule should be shaken, it is not for me to determine.

THE rule then, together with it's illustration, amounts to this: that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

f *de laud. LL. Angl.* 5.

g Plowd. 245. Co. Litt. 15.

h 12 Will. III. c. 2.

i Litt. §. 14, 15.

BUT

BUT here another difficulty arifes. In the fecond, third, fourth, and every fuperior degree, every man has many couples of anceftors, increafing according to the diftances in a geometrical progreffion upwards [k], the defcendants of all which refpective couples are (reprefentatively) related to him in the fame degree. Thus in the fecond degree, the iffue of George and Cecilia Stiles and of Andrew and Efther Baker, the two grandfires and grandmothers of John Stiles, are each in the fame degree of propinquity; in the third degree, the refpective iffues of Walter and Chriftian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themfelves the next kindred of the whole blood to John Stiles. To which therefore of thefe anceftors muft we firft refort, in order to find out defcendants to be preferably called to the inheritance? In anfwer to this, and likewife to avoid all other confufion and uncertainty that might arife between the feveral ftocks wherein the purchafing anceftor may be fought for, another qualification is requifite, befides the *proximity* and *entirety*, which is that of *dignity* or *worthinefs*, of blood. For,

VII. THE feventh and laft rule or canon is, that in collateral inheritances the male ftocks fhall be preferred to the female; (that is, kindred derived from the blood of the male anceftors, however remote, fhall be admitted before thofe from the blood of the female, however near,)—unlefs where the lands have, in fact, defcended from a female.

THUS the relations on the father's fide are admitted *in infinitum*, before thofe on the mother's fide are admitted at all [l]; and the relations of the father's father, before thofe of the father's mother; and fo on. And in this the Englifh law is not fingular, but warranted by the examples of the Hebrew and Athenian laws, as ftated by Selden [m], and Petit [n]; though among the Greeks in the time of Hefiod [o], when a man died without wife or children, all his kindred (without any dif-

k See pag. 204.

l Litt. §. 4.

m *de fucc. Ebraeor. c.* 12.

n *LL. Attic. l.* 1. *t.* 6.

o Θεογον. 606.

tinction)

tinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian [p] abolished all distinction between them. It is also conformable to the customary law of Normandy [q], which indeed in most respects agrees with our English law of inheritance.

HOWEVER, I am inclined to think, that this rule of our laws does not owe it's immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchasor. For, when such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession, but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than from the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

[p] *Nov.* 118.

[q] *Gr. Coustum.* c. 25.

THAT

THAT this was the true foundation of the preference of the *agnati* or male ſtocks, in our law, will farther appear, if we conſider, that, whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed; and no relation of his by the father's ſide, as ſuch, can ever be admitted to them: becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *e converſo*, if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall ever inherit. So alſo, if they in fact deſcended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but alſo of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have deſcended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but alſo of Luke Kempe the father of Cecilia, is excluded. Whereas when the ſide from which they deſcended is forgotten, or never known, (as in the caſe of an eſtate newly purchaſed to be holden *ut feudum antiquum*) here the right of inheritance firſt runs up all the father's ſide, with a preference to the male ſtocks in every inſtance; and, if it finds no heirs there, it then, and then only, reſorts to the mother's ſide; leaving no place untried, in order to find heirs that may by poſſibility be derived from the original purchaſor. The greateſt probability of finding ſuch was among thoſe deſcended from the male anceſtors; but, upon failure of iſſue there, they may poſſibly be found among thoſe derived from the females.

THIS I take to be the true reaſon of the conſtant preference of the agnatic ſucceſſion, or iſſue derived from the male anceſtors, through all the ſtages of collateral inheritance; as the ability for perſonal ſervice was the reaſon for preferring the males at firſt in the direct lineal ſucceſſion. We ſee clearly, that, if males had been perpetually admitted, in utter excluſion of females, the tracing the inheritance back through the male line of anceſtors muſt at laſt have inevitably brought us up to the firſt purchaſor: but, as males have not been *perpe-*

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tually admitted, but only *generally preferred;* as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchasor; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

BEFORE we conclude this branch of our enquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore held as a feud of indefinite antiquity [r].

IN the first place succeeds the eldest son, Matthew Stiles, or his issue: (n° 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue; (n° 2.)—in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue. (n° 3.)—On failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue: (n° 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth or their issue; (n° 5.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue. (n° 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (n° 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (n° 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (n° 9.)—and so on in the paternal grandfathers paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum;* till both the immediate bloods of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the

r See the table of descents annexed.

parents

parents of *John Stiles*'s paternal grandmother: (nº 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (nº 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (nº 13.)—and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent.—Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (nº 14, 15, 16.) Willis's, (nº 17.) Thorpes, (nº 18, 19.) and Whites; (nº 20.) in the same regular successive order as in the paternal line.

THE student should however be informed, that the class, nº 10, would be postponed to nº 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke [s]; from whence it is adopted by lord Bacon [t], and sir Matthew Hale [u]: because, it is said, that all the female ancestors on the part of the father are equally worthy of blood; and, in that case, proximity shall prevail. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) to give the preference to nº 10 before nº 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke: but the law concerning it is delivered *obiter* only, and in the course of argument, by justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief-justice, sir James Dyer, in reporting the resolution of the court in what seems to be the same case [w], takes no notice of this doctrine. 3. Because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of justice Manwoode; since the blood of nº 10 was derived to the purchasor

s Plowd. 450.
t Elem. c. 1.
u H. C. L. 240. 244.
w Dyer. 314.

through

through a greater number of males than the blood of nº 11, and was therefore in their opinion the more worthy of the two. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; wherein nº 16, which is analogous in the maternal line to nº 10 in the paternal, is preferred to nº 18, which is analogous to nº 11, upon the authority of the eighth rule laid down by Hale himself: and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before [x] given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author [y]; and establishes a collateral doctrine, (*viz.* the preference of nº 11 to nº 10) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of nº 11 to nº 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because the reason that is given for this doctrine, by lord Bacon, (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of sir Edward Coke [z]; who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both nº 9 and nº 10 are extinct. Wherefore nº 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14 [a]. (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy, que doit* "*inheriter al pere, doit inheriter al fits* [b]." And so sir Matthew Hale [c] says, "that though the law excludes the father

[x] Pag. 235, 6, 7.

[y] Law of inheritances. 2d edit. pag. 30. 38. 61, 62. 66.

[z] Co. Litt. 12. Hawk. abr. *in loc.*

[a] Fitzh. *Abr. tit. discent.* 2. Bro. *Abr. t. discent.* 3.

[b] See pag. 223.

[c] Hist. C. L. 243.

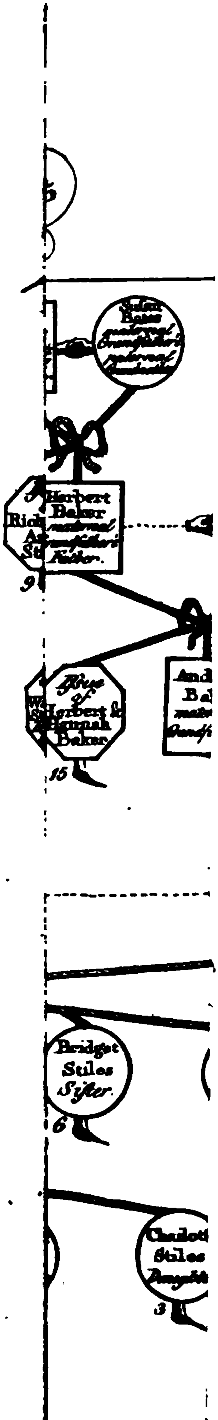
"from

"from inheriting, yet it substitutes and directs the descent, "as it should have been, had the father inherited." Now it is settled, by the resolution in Clere and Brooke, that n° 10 should be inherited before n° 11 to Geoffrey Stiles, the father, had he been the person last seised; and therefore n° 10 ought also to be preferred in inheriting to *John Stiles*, the son.

IN case *John Stiles* was not himself the purchasor, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit: as was formerly fully explained [d]. And the like rule, as is there exemplified, will hold upon descents from any other ancestors.

THE student should also bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor or *stipes*, and must be put in the place of *John Stiles*. The figures therefore denote the order, in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures, (as n° 8.) we must be first assured that all the lower classes (from n° 1 to n° 7.) were extinct, at *John Stiles*'s decease.

[d] See page 236.


Herbert Baker maternal Grandfather's Father
Wife of Herbert & Hannah Baker
Bridget Stiles Sister

CHAPTER THE FIFTEENTH.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquisitio*, taken in it's largest and most extensive sense, is thus defined by Littleton [a]; the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law [b].

PURCHASE, indeed, in it's vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchasor [c]; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchasor; for he takes quite another estate than the law of descents would have given him. Nay even if the ancestor devises his estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase [d]. But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the

a §. 12.
b Co. Litt. 18.
c *Ibid.*
d Lord Raym. 728.

devise than he would have done without it, he shall be adjudged to take by descent [e], even though it be charged with incumbrances [f]; this being for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but, if he dies during the continuance of the particular estate, his heirs shall take as purchasors [g]. But, if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent* [h]. And, if A dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descent [i]. The ancestor, during his life, beareth in himself all his heirs [k]; and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasor originally nominated in the deed, as must have been the case if the remainder had been expresly limited to Matthew or Thomas by name; then, in the times of strict feodal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

WHAT we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquaestus*, or *conquisitio* [l]: both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland [m]: as it was among the Norman jurists, who stiled

e 1 Roll. Abr. 626.
f Salk. 241. Lord Raym. 728.
g 1 Roll. Abr. 627.
h 1 Rep. 104. 2 Lev. 60. Raym. 334.
i 1 Rep. 98.
k Co. Litt. 22.
l Crag. *l.* 1. *t.* 10. §. 18.
m Dalrymple of feuds. 210.

the first purchasor (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur* [n]. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquaestus*, and himself *conquaestor* or *conquisitor* [o]; signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feodal sense of the word, together with the reflexion on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had [p].

THE difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he (or any other in trust for him [q]) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie* coming to him by special occupancy, as heir to [r]) that ancestor, sufficient to answer

n *Gr. Coustum. Gloss. c.* 25. *pag.* 40.

o Spelm. *Gloss.* 145.

p See book I. ch. 3.

q Stat. 29 Car. II. c. 3. §. 10.

r *Ibid.* §. 12.

the

the charge [s]; whether he remains in possession, or hath aliened it before action brought [t]; which sufficient estate is in the law called *assets*; from the French word, *assez*, enough [u]. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent [v].

THIS is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. ESCHEAT, we may remember [w], was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman [x], in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee [y].

ESCHEAT therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other [z]) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent, (being vested in him by act of law, and not by his own act

s 1 P. Wms. 777.
t Stat. 3 & 4 W. & M. c. 14.
u Finch. law. 119.
v Finch. Rep. 86.
w *See pag.* 72.
x *Eschet* or *échet*, formed from the verb *eschoir* or *échoir*, to happen.
y 1 *Feud.* 86. Co. Litt. 13.
z Co. Litt. 13.

or

or agreement) than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*[a]: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred[b]. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title; and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant[c], and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus haeres*, and therefore taking by descent in a kind of caducary succession.

THE law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

ESCHEATS are frequently divided into those *propter defectum sanguinis* and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted[d]. But both these species may well be compre-

a Bro. *Abr. tit. escheat*. 26.

b *Ibid. tit. acceptance*. 25. Co. Litt. 268.

c 1 Inst. 215.

d Co. Litt. 13. 92.

hended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta [e], "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis.*"

ESCHEATS therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

1, 2, 3. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchasor is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

4. A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of it's body, yet if it

e *l.* 6. *c.* 1.

hath

hath human shape, it may be heir [f]. This is a very antient rule in the law of England [g]; and it's reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successions [h]: yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby [i]; (as the *jus trium liberorum*, and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall entitle the husband to be tenant by the curtesy [k]; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

5. BASTARDS are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after it's determination [l]. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* [m]. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchasor: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord [n]. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after it's birth the mother was married to the father [o]: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one twelfth of the inheritance [p]: and a bastard was likewise

[f] Co. Litt. 7, 8.

[g] *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa sit, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.* Bract. *l.* 1. *c.* 6. & *l.* 5. *tr.* 5. *c.* 30.

[h] *Ff.* 1. 5. 14.

[i] *Ff.* 50. 16. 135. Paul. 4. *sent.* 9. §. 63.

[k] Co. Litt. 29.

[l] See book I. ch. 16.

[m] Co. Litt. 8.

[n] Finch. law. 117.

[o] *Nov.* 89. *c.* 8.

[p] *Ibid. c.* 12.

capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not [q]. But our law, in favour of marriage, is much less indulgent to bastards.

THERE is indeed one instance, in which our law has shewn them some little regard; and that is usually termed the case of *bastard eignè* and *mulier puisnè*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvil [r] expresses it in his Latin, *filius mulieratus;* the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs, (though minors, feme coverts, or under any incapacity whatsoever) are totally barred of their right [s]. And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all [t].

q *Cod.* 6. 57. 5.
r *l.* 7. *c.* 1.
s Litt. §. 399. Co. Litt 244.
t Litt. §. 400.

As baſtards cannot be heirs themſelves, ſo neither can they have any heirs but thoſe of their own bodies. For, as all collateral kindred conſiſts in being derived from the ſame common anceſtor, and as a baſtard has no legal anceſtors, he can have no collateral kindred; and, conſequently, can have no legal heirs, but ſuch as claim by a lineal deſcent from himſelf. And therefore if a baſtard purchaſes land and dies ſeiſed thereof without iſſue, and inteſtate, the land ſhall eſcheat to the lord of the fee [u].

6. ALIENS [v] alſo are incapable of taking by deſcent, or inheriting [w]: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reaſons ſtrictly feodal. Though, if lands had been ſuffered to fall into their hands who owe no allegiance to the crown of England, the deſign of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his lands ſhall eſcheat to the lord.

As aliens cannot inherit, ſo far they are on a level with baſtards; but as they are alſo diſabled to hold by purchaſe [x], they are under ſtill greater diſabilities. And, as they can neither hold by purchaſe, nor by inheritance, it is almoſt ſuperfluous to ſay that they can have no heirs, ſince they can have nothing for an heir to inherit; but ſo it is expreſsly holden [y], becauſe they have not in them any inheritable blood.

AND farther, if an alien be made a denizen by the king's letters patent, and then purchaſes lands, (which the law allows ſuch a one to do) his ſon, born before his denization, ſhall not (by the common law) inherit thoſe lands; but a ſon born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldeſt ſon; but by denization it acquires

[u] Bract. *l.* 2. *c.* 7. Co. Litt. 244.
[v] See Book I. ch. 10.
[w] Co. Litt. 8.
[x] *Ibid.* 2.
[y] *Ibid.* 1 Lev. 59.

an

an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not[z].

SIR Edward Coke[a] also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the antient law; not only from the rule before cited[b], that *cestuy, que doit inheriter al pere, doit inheriter al fits*; but also because we have seen that the only feodal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum*; that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled[c]; and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent[d]. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

[z] Co. Litt. 129.
[a] 1 Inst. 8.
[b] See pag. 223 and 239.
[c] 1 Ventr. 413. 1 Lev. 59. 1 Sid. 193.
[d] See pag. 226.

IT is alſo enacted, by the ſtatute 11 & 12 W. III. c. 6. that all perſons, being natural-born ſubjects of the king, may inherit and make their titles by deſcent from any of their anceſtors lineal or collateral; although their father or mother, or other anceſtor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in caſe perſons ſhould thereby gain a future capacity to inherit, who did not exiſt at the death of the perſon laſt ſeiſed. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born ſubject, upon John's death without iſſue his lands will deſcend to Oliver the younger brother: now, if afterwards Francis has a child born in England, it was feared that, under the ſtatute of king William, this new-born child might defeat the eſtate of his uncle Oliver. Wherefore it is provided, by the ſtatute 25 Geo. II. c. 39. that no right of inheritance ſhall accrue by virtue of the former ſtatute to any perſons whatſoever, unleſs they are in being and capable to take as heirs at the death of the perſon laſt ſeiſed:—with an exception however to the caſe, where lands ſhall deſcend to the daughter of an alien; which deſcent ſhall be diveſted in favour of an after-born brother, or the inheritance ſhall be divided with an after-born ſiſter or ſiſters, according to the uſual rule [d] of deſcents by the common law.

7. BY attainder alſo, for treaſon or other felony, the blood of the perſon attainted is ſo corrupted, as to be rendered no longer inheritable.

GREAT care muſt be taken to diſtinguiſh between forfeiture of lands to the king, and this ſpecies of eſcheat to the lord; which, by reaſon of their ſimilitude in ſome circumſtances, and becauſe the crown is very frequently the immediate lord of the fee and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever elſe the offender poſſeſſed, was the doctrine of the old Saxon law [e], as a part of puniſhment for the offence;

[d] See pag. 208 and 214. [e] *LL. Aelfred*, c. 4. *LL. Canut.* c. 54.

and

and does not at all relate to the feodal ſyſtem, nor is the conſequence of any ſigniory or lordſhip paramount [f]: but, being a prerogative veſted in the crown, was neither ſuperſeded nor diminiſhed by the introduction of the Norman tenures; a fruit and conſequence of which, eſcheat muſt undoubtedly be reckoned. Eſcheat therefore operates in ſubordination to this more antient and ſuperior law of forfeiture.

THE doctrine of eſcheat upon attainder, taken ſingly, is this: that the blood of the tenant, by the commiſſion of any felony, (under which denomination all treaſons were formerly comprized [g]) is corrupted and ſtained, and the original donation of the feud is thereby determined, it being always granted to the vaſal on the implied condition of *dum bene ſe geſſerit*. Upon the thorough demonſtration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the eſtate inſtantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguiſhed and blotted out for ever. In this ſituation the law of feodal eſcheat was brought into England at the conqueſt; and in general ſuperadded to the antient law of forfeiture. In conſequence of which corruption and extinction of hereditary blood, the land of all felons would immediately reveſt in the lord, but that the ſuperior law of forfeiture intervenes, and intercepts it in it's paſſage: in caſe of treaſon, for ever; in caſe of other felony, for only a year and a day; after which time it goes to the lord in a regular courſe of eſcheat [h], as it would have done to the heir of the felon in caſe the feodal tenures had never been introduced. And that this is the true operation and genuine hiſtory of eſcheats will moſt evidently appear from this incident to gavelkind lands, (which ſeems to be the old Saxon tenure) that they are in no caſe ſubject to eſcheat for felony, though they are liable to forfeiture for treaſon [i].

[f] 2 Inſt. 64. Salk. 85.

[g] 3 Inſt. 15. Stat. 25 Edw. III. c. 2. §. 12.

[h] 2 Inſt. 36.

[i] Somner. 53. Wright. Ten. 118.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates, for it is expresly provided by the statute 5 & 6 Edw. VI. c. 11. that the wife of one attaint of high treason shall not be endowed at all.

HITHERTO we have only spoken of estates vested in the offender, at the time of his offence or attainder. And here the law of forfeiture stops; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit [k]. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king for a year and a day, and so long after as the offender lives [l].

THERE is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person

[k] Co. Litt. 13.

[l] 3 Inst. 47.

attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony [m]. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor [n], at least on the part of their attainted father.

THIS corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children [o].

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have

[m] Van Leeuwen *in* 2 *Feud*. 31.
[n] Co. Litt. 391.
[o] *Ibid*. 392.

seen,

seen, that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir: and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood [p]. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord [q]. Sir Edward Coke in this case allows [r], that if the ancestor be attainted, his sons born before the attainder may be heirs to each other; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the principles beforementioned, which are now overruled [s]) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

UPON the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates thus impeded in their descent, result back and escheat to the lord.

[p] Co. Litt 8.
[q] Dyer. 48.
[r] Co. Litt. 8.
[s] 1 Hal. P. C. 357.

THIS corruption of blood, thus arifing from feodal principles, but perhaps extended farther than even thofe principles will warrant, has been long looked upon as a peculiar hardfhip: becaufe the oppreffive parts of the feodal tenures being now in general abolifhed, it feems unreafonable to referve one of their moft inequitable confequences; namely, that the children fhould not only be reduced to prefent poverty, (which, however fevere, is fufficiently juftified upon reafons of public policy) but alfo be laid under future difficulties of inheritance, on account of the guilt of their anceftors. And therefore in moft (if not all) of the new felonies created by parliament fince the reign of Henry the eighth, it is declared that they fhall not extend to any corruption of blood: and by the ftatute 7 Ann. c. 21. (the operation of which is poftponed by the ftatute 17 Geo. II. c. 39.) it is enacted, that, after the death of the late pretender, and his fons, no attainder for treafon fhall extend to the difinheriting any heir, nor the prejudice of any perfon, other than the offender himfelf: which provifions have indeed carried the remedy farther, than was required by the hardfhip above complained of; which is only the future obftruction of defcents, where the pedigree happens to be deduced through the blood of an attainted anceftor.

BEFORE I conclude this head, of efcheat, I muft mention one fingular inftance in which lands held in fee-fimple are not liable to efcheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the cafe of a corporation; for if that comes by any accident to be diffolved, the donor or his heirs fhall have the land again in reverfion, and not the lord by efcheat; which is perhaps the only inftance where a reverfion can be expectant on a grant in fee-fimple abfolute. But the law, we are told[t], doth tacitly annex a condition to every fuch gift or grant, that if the corporation be diffolved, the donor or grantor fhall re-enter; for the caufe of the gift or grant

t Co. Litt. 13.

failleth,

faileth. This is indeed founded upon the self-same principle as the law of escheat: the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vasal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I. st. 1. to which this very singular instance still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4. (*a*) that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent, as well as purchase, any real estates whatsoever; and his next of kin being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own [u] and the feodal law; *eo quod desiit esse miles seculi qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium* [w]. But yet he was accounted only *civiliter mortuus;* he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

THESE are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

[u] Co. Litt. 132.

[w] 2 *Feud.* 21.

(*a*) This act, in this respect, is now repealed, by statute 18 Geo. III. c. 60. under certain qualifications therein mentioned.

CHAPTER THE SIXTEENTH.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking poſſeſſion of thoſe things, which before belonged to nobody. This, as we have ſeen [a], is the true ground and foundation of all property, or of holding thoſe things in ſeveralty, which by the law of nature, unqualified by that of ſociety, were common to all mankind. But when once it was agreed that every thing capable of ownerſhip ſhould have an owner, natural reaſon ſuggeſted, that he who could firſt declare his intention of appropriating any thing to his own uſe, and, in conſequence of ſuch intention, actually took it into poſſeſſion, ſhould thereby gain the abſolute property of it; according to that rule of the law of nations, recognized by the laws of Rome [b], *quod nullius eſt, id ratione naturali occupanti conceditur.*

THIS right of occupancy, ſo far as it concerns real property, (for of perſonal chattels I am not in this place to ſpeak) hath been confined by the laws of England within a very narrow compaſs; and was extended only to a ſingle inſtance: namely, where a man was tenant *pur auter vie*, or had an eſtate granted to himſelf only (without mentioning his heirs) for the life of another man, and died during the life of *ceſtuy que vie*, or him by whoſe life it was holden: in this caſe he, that could firſt enter on the land, might lawfully retain the poſſeſſion ſo long as *ceſtuy que vie* lived, by right of occupancy [c].

THIS ſeems to have been recurring to firſt principles, and calling in the law of nature to aſcertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though it formerly [d] was ſuppoſed ſo to do; for he had parted with all his intereſt, ſo long as *ceſtuy que vie* lived: it did not eſcheat to the lord of the fee; for all eſcheats muſt be of the abſolute entire fee, and not of any

a See pag. 3 & 8.

b *Ff.* 41. 1. 3.

c Co. Litt. 41.

d Bract. *l.* 2. *c.* 9. *l.* 4. *tr.* 3. *c.* 9. §. 4. Flet. *l.* 3. *c.* 12. §. 6. *l.* 5. *c.* 5. §. 15.

particular

particular estate carved out of it; much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the *haereditas jacens* of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because *nullum tempus occurrit regi* [d]. And, even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety [e]; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes: the one, 29 Car. II. c. 3. which enacts (according to the antient rule of law [f]) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators and be assets in their hands for payment of debts: the other that of 14 Geo. II. c. 20. which enacts, that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished: though that of *special* occupancy, by the heir at law, continues to this day; such heir being

[d] Co. Litt. 41. [e] Vaugh. 201. [f] Bract. *ibid.* Flet. *ibid.*

held to succeed to the anceſtor's eſtate, not by deſcent, for then he muſt take an eſtate of inheritance, but as an occupant ſpecially marked out and appointed by the original grant. But, as before the ſtatutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowſons, commons, or the like [g], (becauſe, with reſpect to them, there could be no actual entry made, or corporal ſeiſin had; and therefore by the death of the grantee *pur auter vie* a grant of ſuch hereditaments was entirely determined) ſo now, I apprehend, notwithſtanding theſe ſtatutes, ſuch grant would be determined likewiſe; and the hereditaments would not be deviſeable, nor veſt in the executors, nor go in a courſe of diſtribution (*a*). For theſe ſtatutes muſt not be conſtrued ſo as to create any new eſtate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reverſion; but merely to diſpoſe of an intereſt in being, to which by law there was no owner, and which therefore was left open to the firſt occupant. When there is a reſidue left, the ſtatutes give it to the executors and adminiſtrators, inſtead of the firſt occupant; but they will not *create* a reſidue, on purpoſe to give it to either [h]. They only meant to provide

g Co. Litt. 41. Vaugh. 201.

h But ſee now the ſtatute 5 Geo. III. c. 17. which makes leaſes for one, two or three lives by *eccleſiaſtical* perſons or any *eleemoſynary* corporation of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purpoſes* as leaſes of corporeal poſſeſſions.

(*a*) But, by the lord keeper Harcourt, in the caſe of Rawlinſon v. the dutcheſs of Montague and others, (3 P. Will. 264. in the notes) as to *rents, &c.* granted *pur auter vie*, the ſtatute of frauds and perjuries has made an alteration; for, by that ſtatute, any eſtate *pur auter vie* is made deviſeable; and if not deviſed away, ſhall be aſſets in the hands of the heir, if limited to the heir; if not limited to the heir, it ſhall go to the executors or adminiſtrators of the grantees, and be aſſets in their hands. So that, if ſince that ſtatute a rent be granted to A for the life of B, and A die living B, A's executors or adminiſtrators ſhall have it during the life of B; for the ſtatute is not only made to prevent the inconvenience of ſcrambling for eſtates, and getting the firſt poſſeſſion after the death of the grantee, but likewiſe for preſerving and continuing the eſtate during the life of the *ceſtuy que vie*; and it is reaſonable, ſince the grantee might by deed have diſpoſed of the rent during the life of the *ceſtuy que vie*, that, though by his dying without having made any ſuch diſpoſition, in nicety of law this eſtate would have determined, yet, by the ſtatute, that intereſt which paſſed from the grantor ought to be preſerved, and ſhall go to the executors or adminiſtrators of the grantee, during the life of the *ceſtuy que vie*. And the ſtatute, in this caſe, does not *inlarge*, but only *preſerve* the eſtate of the grantee.

an appointed inſtead of a caſual, a certain inſtead of an uncertain, owner of lands which before were nobody's; and thereby to ſupply this *caſus omiſſus*, and render the diſpoſition of law in all reſpects entirely uniform: this being the only inſtance wherein a title to a real eſtate could ever be acquired by occupancy.

THIS, I ſay, was the only inſtance; for I think there can be no other caſe deviſed, wherein there is not ſome owner of the land appointed by the law. In the caſe of a ſole corporation, as a parſon of a church, when he dies or reſigns, though there is no *actual* owner of the land till a ſucceſſor be appointed, yet there is a *legal*, *potential* ownerſhip, ſubſiſting in contemplation of law; and when the ſucceſſor is appointed, his appointment ſhall have a retroſpect and relation backwards, ſo as to entitle him to all the profits from the inſtant that the vacancy commenced. And, in all other inſtances, when the tenant dies inteſtate, and no other owner of the lands is to be found in the common courſe of deſcents, there the law veſts an ownerſhip in the king, or in the ſubordinate lord of the fee, by eſcheat.

So alſo in ſome caſes, where the laws of other nations give a right by occupancy, as in lands newly created, by the riſing of an iſland in the ſea or in a river, or by the alluvion or dereliction of the waters; in theſe inſtances the law of England aſſigns them an immediate owner. For Bracton tells us [i], that if an iſland ariſe in the *middle* of a *river*, it belongs in common to thoſe who have lands on each ſide thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the neareſt ſhore: which is agreeable to, and probably copied from, the civil law [k]. Yet this ſeems only to be reaſonable, where the ſoil of the river is equally divided between the owners of the oppoſite ſhores: for if the whole ſoil is the freehold of any one man, as it uſually is whenever a ſeveral fiſhery is claimed [l], there it ſeems juſt (and ſo is the conſtant practice) that the eyotts or little iſlands, ariſing in any part of the river, ſhall be the property of him who owneth the piſcary and the ſoil. However, in caſe a new iſland riſe in the *ſea*, though the civil law gives it to the firſt occupant [m],

i *l.* 2. *c.* 2.
k *Inſt.* 2. 1. 22.
l Salk. 637. See page 39.
m *Inſt.* 2. 1. 18.

yet

yet ours gives it to the king [n]. And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining [o]. For *de minimis non curat lex*: and, besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry [p]. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's, or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss [q]. And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law [r]; from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked [s], that whatever hath no other owner is vested by law in the king.

[n] Bract. *l.* 2. *c.* 2. Callis of sewers. 22.

[o] 2 Roll. Abr. 170. Dyer. 326.

[p] Callis. 24. 28.

[q] *Ibid.* 28.

[r] *Inst.* 2. 1. 20, 21, 22, 23, 24.

[s] See Vol. I. pag. 298.

CHAPTER THE SEVENTEENTH.

OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of these commentaries [a]. At present therefore I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then shew, what sort of things may be prescribed for.

AND, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to any *person*: such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as, that Sempronius, and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege [b]. As for example: if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held [c] to be a lawful usage) this is strictly a custom, for it is applied to the place in general, and not to any particular *persons*: but if the

[a] See Vol. I. pag. 75, &c.

[b] Co. Litt. 113.

[c] 1 Lev. 176.

tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath [d]: which last is called prescribing in a *que estate*. And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended [e] for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII. c. 2. it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such prescription made [f].

SECONDLY, as to the several species of things which may, or may not, be prescribed for: we may, in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, *&c*; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had [g]. For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must always be

[d] 4 Rep. 32.

[e] Co. Litt. 113.

[f] This title, of prescription, was well known in the Roman law by the name of *usucapio*; (*Ff*. 41. 3. 3.) so called because a man, that gains a title by prescription, may be said *usu rem capere*.

[g] Dr & St. dial. 1. c. 8. Finch. 132.

laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates[h]. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with it's appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription[i]. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record[k]. 5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate he holds) nothing

h 4 Rep. 31, 32.

i 1 Ventr. 387.

k Co. Litt. 114.

is

is claimable by this prefcription, but fuch things as are incident, appendant, or appurtenant to lands; for it would be abfurd to claim any thing as the confequence, or appendix, of an eftate, with which the thing claimed has no connexion: but, if he prefcribes in himfelf and his anceftors, he may prefcribe for any thing whatfoever that lies in grant; not only things that are appurtenant, but alfo fuch as may be in grofs [l]. Therefore a man may prefcribe, that he, and thofe whofe eftate he hath in the manor of Dale, have ufed to hold the advowfon of Dale, as *appendant* to that manor: but, if the advowfon be a diftinct inheritance, and not appendant, then he can only prefcribe in his anceftors. So alfo a man may prefcribe in a *que eftate* for a common *appurtenant* to a manor; but, if he would prefcribe for a common *in grofs*, he muft prefcribe in himfelf and his anceftors. 6. Laftly, we may obferve, that eftates gained by prefcription are not, of courfe, defcendible to the heirs general, like other purchafed eftates, but are an exception to the rule. For, properly fpeaking, the prefcription is rather to be confidered as an evidence of a former acquifition, than as an acquifition *de novo*: and therefore, if a man prefcribes for a right of way in himfelf and his anceftors, it will defcend only to the blood of that line of anceftors in whom he fo prefcribes; the prefcription in this cafe being indeed a fpecies of defcent. But, if he prefcribes for it in a *que eftate*, it will follow the nature of that eftate in which the prefcription is laid, and be inheritable in the fame manner, whether that were acquired by defcent or purchafe: for every acceffory followeth the nature of it's principal.

[l] Litt. §. 183. Finch. L. 104.

CHAPTER THE EIGHTEENTH.

OF TITLE BY FORFEITURE.

FORFEITURE is a punifhment annexed by law to fome illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he lofes all his intereft therein, and they go to the party injured, as a recompenfe for the wrong which either he alone, or the public together with himfelf, hath fuftained.

LANDS, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and mifdemefnors. 2. By alienation contrary to law. 3. By non-prefentation to a benefice, when the forfeiture is denominated a *lapfe*. 4. By fimony. 5. By non-performance of conditions. 6. By wafte. 7. By breach of copyhold cuftoms. 8. By bankruptcy.

I. THE foundation and juftice of forfeitures for *crimes and mifdemefnors*, and the feveral degrees of thofe forfeitures, proportioned to the feveral offences, have been hinted at in the preceding volume [a]; but will be more properly confidered, and more at large in the fourth book of thefe commentaries. At prefent I fhall only obferve in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following fix: 1. Treafon. 2. Felony. 3. Mifprifion of treafon. 4. *Praemunire*. 5. Drawing

[a] Vol. I. pag. 299.

a weapon

a weapon on a judge, or ſtriking any one in the preſence of the king's principal courts of juſtice. 6. Popiſh recuſancy, or non-obſervance of certain laws enacted in reſtraint of papiſts. But at what time they ſeverally commence, how far they extend, and how long they endure, will with greater propriety be reſerved as the object of our future inquiries.

II. LANDS and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants;* in the two former of which caſes the forfeiture ariſes from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. ALIENATION in *mortmain*, *in mortui manu*, is an alienation of lands or tenements to any corporation, ſole or aggregate, eccleſiaſtical or temporal. But theſe purchaſes having been chiefly made by religious houſes, in conſequence whereof the lands became perpetually inherent in one dead hand, this hath occaſioned the general appellation of mortmain to be applied to ſuch alienations [b], and the religious houſes themſelves to be principally conſidered in forming the ſtatutes of mortmain; in deducing the hiſtory of which ſtatutes, it will be matter of curioſity to obſerve the great addreſs and ſubtle contrivance of the eccleſiaſtics in eluding from time to time the laws in being, and the zeal with which ſucceſſive parliaments have purſued them through all their fineſſes: how new remedies were ſtill the parents of new evaſions; till the legiſlature at laſt, though with difficulty, hath obtained a deciſive victory.

BY the common law any man might diſpoſe of his lands to any other private man at his own diſcretion, eſpecially when the feodal reſtraints of alienation were worn away. Yet in conſequence of theſe it was always, and is ſtill, neceſſary [c], for corporations to have a licence in mortmain

[b] See Vol. I. pag. 479.

[c] F. N. B. 121.

from

from the crown, to enable them to purchase lands: for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feodal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest [d]. But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also, (upon the same feodal principles) for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain, as a forfeiture. The necessity of this licence from the crown was acknowleged by the constitutions of Clarendon [e], in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations [f]. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feodal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to

d Selden. Jan. Angl. l. 2. §. 45.

e *Ecclesiae de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius. c. 2. A.D. 1164.*

f See Vol. I. p. 348.

stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordered by the second of king Henry III's great charters [g], and afterwards by that printed in our common statute-book, that all such attempts should be void, and the land forfeited to the lord of the fee [h].

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, sir Edward Coke observes [i], in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 Edw. I; which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive, under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an

g A. D. 1217. *cap.* 43. *edit. Oxon.*

h *Non liceat alicui de caetero dare terram suam alicui domui religiosae, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiosae terram alicujus sic accipere, quod tradat illam ei a quo ipsam recepit tenendam: si quis autem de caetero terram suam domui religiosae sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino suo illius feodi incurratur. Mag. Cart.* 9 *Hen. III. c.* 36.

i 2 Inst. 75.

action to recover it against the tenant; who, by fraud and collusion made no defence, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32. enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter [k], in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I. abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord [l], a proviso was inserted [m] that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was marked out, by the statute 27 Edw. I. st. 2. it was farther provided by statute 34 Edw. I. st. 3. that no such licence should be effectual, without the consent of the mesne or intermediate lords.

YET still it was found difficult to set bounds to ecclesiastical ingenuity: for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving

k *cap.* 33.
l 2 Inst. 501.
m *cap.* 3.

the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Ric. II. c. 5. enacts that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

BUT, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to it's own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. st. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid [n], since the kings had no

[n] 2 Hawk. P. C. 391.

power

power to dispense with the statutes of mortmain by a clause of *non obstante* [o], which was the usual course, though it seems to have been unnecessary [p]: and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37. that the crown for the future at its own discretion may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden.

AFTER the dissolution of monasteries under Henry VIII. though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. and M. c. 8. and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3. that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* *per annum* may be augmented by the purchase of lands, without licence of mortmain in either case; and the like provision hath been since made, in favour of the governors of queen Anne's bounty [q]. It hath also been held [r], that the statute 23 Hen. VIII. before mentioned did not extend to any thing but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended from recent experience, that persons on their deathbeds might make large and improvident dispositions even for these good purposes, and defeat the political end of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged

o Stat. 1 W. & M. st. 2. c. 2.
p Co. Litt. 99.
q Stat. 2 & 3 Ann. c. 11.
r 1 Rep. 24.

with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after it's execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations.

2. SECONDLY, alienation *to an alien* is also a cause of forfeiture to the crown of the lands so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land [s], but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume [t].

3. LASTLY, alienations *by particular tenants*, when they are greater than the law entitles them to make, and devest the remainder or reversion [v], are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life aliens by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion [u]. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connexion and dependence; it implies a refusal to perform the due renders and services to the lord of

[s] See pag. 249, 250.
[t] Book I. pag. 372.
[v] Co. Litt. 251.
[u] Litt. §. 415.

the

the fee, of which fealty is constantly one; and it tends in it's consequence to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *discontinuance* (as it is called [w]) of the estate-tail, which the issue may afterwards avoid by due course of law [x]: for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law [y]. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

EQUIVALENT, both in it's nature and it's consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*; as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord [z], upon reasons most appa-

w See book III. ch. 10.
x Litt. §. 595. 6. 7.
y Co. Litt. 233.
z Finch. 270, 271.

rently feodal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenants of a superior class [a]; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like [b]; such behaviour amounts to a forfeiture of his particular estate.

III. LAPSE is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority [c]) of the council of Lateran [d], which was in the reign of our Henry the second, when the bishops first began to exercise universally the right of institution to churches [e]. And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary [f], unless it hath been augmented by the queen's bounty [g]. But no right of lapse can accrue, when the original presentation is in the crown [h].

THE term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months [i]; (following in this case the computation of the church, and not the usual one of the common law) and this exclusive of

a Co. Litt. 252.
b *Ibid.* 253.
c 2 Roll. Abr. 336. pl. 10.
d Bracton. *l.* 4. *tr.* 2. *c.* 3.
e See pag. 23.
f Bro. *Abr. tit. Quar. Imped.* 3 Cro. Jac. 518.
g St. 1 Geo. I. st. 2. c. 10.
h Stat. 17 Edw. II. c. 8. 2 Inst. 273.
i 6 Rep. 62. Regist. 42.

the day of the avoidance [k]. But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in [l]; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk [m]. For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the arch-bishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the arch-bishop [n]. For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi* [o]. And therefore it may seem, as if the church might continue void for ever, unless the king shall be pleased to present; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit*: but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation [p].

[k] 2 Inst. 361.
[l] Gibs. Cod. 769.
[m] 2 Inst. 273.
[n] 2 Roll. Abr. 368.
[o] Dr.&St. d. 2. c. 36. Cro. Car. 355.
[p] 7 Rep. 28. Cro. Eliz. 44.

In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse [q]. Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* [r]. If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is stiled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong [s]. Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided [t].

IV. By *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as sir Edward Coke observes [u], it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However it was not an offence punishable in a criminal way at the common law [w]; it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect

[q] 4 Rep. 75. 2 Inst. 632.
[r] Co. Litt. 344, 345.
[s] 2 Roll. Abr. 369.
[t] Co. Litt. 344.
[u] 3 Inst. 156.
[w] Moor. 564.

the

the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, which regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they devest the corrupt patron of the right of presentation, and vest a new right in the crown.

BY the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only [x]. But if the presentee dies, without being convicted of such simony in his life-time, it is enacted by stat. 1 W. & M. c. 16. that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown or otherwise. Also by the statute 12 Ann. stat. 2. c. 12. if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

UPON these statutes many questions have arisen, with regard to what is, and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony [y]; this being expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne [z]: and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented

x For other penalties inflicted by this statute, see book IV. ch. 4.

y Cro. Eliz. 788. Moor. 914.

z Hob. 165.

at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him [a]. 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture [b]. 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal [c], provided the patron or his relations be not benefited thereby [d]; for this is no corrupt consideration, moving to the patron. 6. That bonds of resignation, in case of non-residence or taking any other living, are not simoniacal [e]; there being no corrupt consideration herein, but such only as is for the good of the public. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son [f]. 7. Lastly, general bonds to resign at the patron's request are held to be legal [g]: for they may possibly be given for one of the legal considerations beforementioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof (*b*). But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to shew the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general

a Cro. Eliz. 686. Moor. 916.
b 3 Inst. 154. Cro. Jac. 385.
c Noy. 142.
d Stra. 534.
e Cro. Car. 180.
f Cro. Jac. 248. 274.
g Cro. Car. 180. Stra. 227.

(*b*) [However, in a late case (bishop of London against Fitch, Dom. Procer. 1783), notwithstanding the authorities cited in the margin, and a series of other decisions in support of the validity of general bonds of resignation, by which authorities the Court of Common Pleas in the first instance, and the King's Bench afterwards, held themselves bound, it was adjudged, that general bonds to resign at the patron's request, are simoniacal and illegal.]

bond

bond of resignation; as by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent[h].

V. THE next kind of forfeitures are those by *breach* or non-performance of a *condition* annexed to the estate, either expressly by deed at it's original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter[i].

VI. I THEREFORE now proceed to another species of forfeiture, *viz.* by *waste*. Waste, *vastum*, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail[k].

WASTE is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste[l]. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste[m]. If a house be destroyed by tempest, lightning, or the like, which is the act of providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the statute 6 Ann. c. 31. no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance[n]. Timber also is part of the inheritance[o]. Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered

h 1 Vern. 411. 1 Equ. Cas. Abr. 86, 87. Stra. 534.

i See chap. 10. pag. 152.

k Co. Litt. 53.

l Hetl. 35.

m 4 Rep. 64.

n Co. Litt. 53.

o 4 Rep. 62.

as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste [p]. But underwood the tenant may cut down at any seasonable time that he pleases [q]; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions [r]. The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture; are all of them waste [s]. For, as sir Edward Coke observes [t], it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in it's value [u]. To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance [v]: but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use [w]; for it is now become the mere annual profit of the land. These three are the general heads of waste, *viz.* in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

LET us next see, who are liable to be punished for committing waste. And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vasals or feudatories; "*si vasallus feudum dissipaverit, "aut insigni detrimento deterius fecerit, privabitur* [x]." But in our antient common law the rule was by no means so large: for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian

p Co. Litt. 53.
q 2 Roll. Abr. 817.
r Co. Litt. 41.
s Hob. 296.
t 1 Inst. 53.
u 1 Lev. 309.
v 5 Rep. 12.
w Hob. 295.
x Wright. 44.

in

in chivalry, tenant in dower, and tenant by the curtesy [y]; and not in tenant for life or years [z]. And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favour of the owners of the inheritance, the statutes of Marlbridge 52 Hen. III. c. 23. and of Glocester 6 Edw. I. c. 5. provided that the writ of waste shall not only lie against tenants by the law of England, (or curtesy) and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti;* that is, with a provision or protection that no man shall *impetere*, or sue him, for waste committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at it's creation an estate of inheritance, and so not within the statutes [a]. Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit;* because against them the debtor may set off the damages in account [b]: but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor [c].

THE punishment for waste committed was, by common law and the statute of Marlbridge, only single damages [d]; except in the case of a guardian, who also forfeited his wardship [e] by the provisions of the great charter [f]: but the statute of Glocester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is com-

y It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. *tit. waste*. 88. 2 Inst. 301.

z 2 Inst. 299.

a Co. Litt. 27. 2 Roll. Abr. 826. 828.

b Co. Litt. 54.

c F. N. B. 58.

d 2 Inst. 146.

e *Ibid.* 300.

f 9 Hen. III. c. 4.

mitted, and also treble damages, to him that hath the inheritance. The expression of the statute is, "he shall forfeit "the *thing* which he hath wasted;" and it hath been determined, that under these words the *place* is also included [g]. And if waste be done *sparcim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a house, the whole house shall be forfeited [h]; because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separated from the rest) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner [i].

VII. A SEVENTH species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste; whereupon the lord may seize them without any presentment by the homage [k]; but also to peculiar forfeitures, annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe that, as these tenements were originally holden by the lowest and most abject vasals, the marks of feodal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feodal law, and were denominated *feloniae, per quas vasallus amitteret feudum* [l], still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service [m]; *si dominum deservire noluerit* [n]: by disclaiming to hold of the lord, or swearing himself not his copyholder [o]; *si dominum ejuravit, i. e. negavit se a domino feudum habere* [p]: by neglect to be admitted tenant within a year and a day [q]; *si per annum*

g 2 Inst. 303.
h Co. Litt. 54.
i 2 Inst. 304.
k 2 Ventr. 38. Cro. Eliz. 499.
l *Feud. l.* 2. *t.* 26. *in calc.*
m 3 Leon. 108. Dyer. 211.
n *Feud. l.* 1. *t.* 21.
o Co. Copyh. §. 57.
p *Feud. l.* 2. *t.* 34. & *t.* 26. §. 3.
q Plowd. 372.

et

et diem cessaverit in petenda investitura[r]: by contumacy in not appearing in court after three proclamations[s]; *si a domino ter citatus non comparuerit*[t]: or by refusing, when sworn of the homage, to present the truth according to his oath[u]; *si pares veritatem noverint, et dicant se nescire, cum sciant*[w]. In these, and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron[x]; *per laudamentum parium suorum*[y]: or, as it is more fully expressed in another place[z], *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda*[a] *per judicium parium suorum.*

VIII. THE eighth and last method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined; a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.

WHO shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavour more fully to explain it's nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements is transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

BY the statute 13 Eliz. c. 7. the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and

r *Feud. l.* 2. *t.* 24.
s 8 Rep. 99. Co. Copyh. §. 57.
t *Feud. l.* 2. *t.* 22.
u Co. Copyh. §. 57.
w *Feud. l.* 2. *t.* 58.
x Co. Copyh. §. 58.
y *Feud. l.* 1. *t.* 21.
z *Ibid. t.* 22.
a *i. e. arbitranda, definienda.* Du Fresne. IV. 79.

tenements which were purchased by him jointly with his wife or children to his own use, (or such interest therein as he may lawfully part with) or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expresly included not only free, but customary and copyhold, lands: but did not extend to estates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be impowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And also, by this and a former act [b], all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchasor *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent.

[b] 1 Jac. I. c. 15.

CHAPTER THE NINETEENTH.

OF TITLE BY ALIENATION.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in it's limited sense: under which may be comprized any method wherein estates are voluntarily resigned by one man, and accepted by another: whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

THIS means of taking estates, by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feodal law [a], a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feodal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feodal restraint of alienation would have been easily frustrated and evaded [b]. And, as he could not aliene it in his life-time, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive heir [c]. And therefore it was very usual in antient feoffments to express, that

[a] See pag. 57.
[b] *Feud. l. 1. t. 27.*
[c] Co. Litt. 94. Wright. 168.

the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant [d]. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vasal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seising of his cattle by the lord of a neighbouring clan [e]. This consent of the vasal was expressed by what was called *attorning* [f], or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchasor, and to become his tenant, the grant or contract was in most cases void, or at least incomplete [g]: which was also an additional clog upon alienations.

BUT by degrees this feodal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when it's transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors [h]:

[d] Madox, *Formul. Angl.* nº. 316. 319. 427.

[e] Gilb. Ten. 75.

[f] The same doctrine and the same denomination prevailed in Bretagne—*possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoris.* D'Argentre *Antiq. Consuet. Brit. apud* Dufresne. i. 819, 820.

[g] Litt. §. 551.

[h] *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam, LL. Hen. I. c.* 70.

doctrine

a doctrine which is countenanced by the feodal constitutions themselves [i]: but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate [k]. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to aliene [l]: and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir [m]. By the great charter of Henry III [n], no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land [o]. But these restrictions were in general removed by the statute of *quia emptores* [p], whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion [q]. And even these tenants *in capite*, were by the statute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king [r]. By the temporary statutes 7 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2. which [s] subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III. c. 9. and in other similar recognizances by statute 23 Hen.

i *Feud. l.* 2. *t.* 39.

k *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum haeredem exhaeredare.* Glanvil. *l.* 7. *c.* 1.

l Mirr. c. 1. §. 3. This is also borrowed from the feodal law. *Feud. l.* 2. *t.* 48.

m Mirr. *ibid.*

n 9 Hen. III. c. 32.

o Dalrymple of feuds. 95.

p 18 Edw. I. c. 1.

q See pag. 72. 91.

r 2 Inst. 67.

s 13 Edw. I. c. 18.

VIII. c. 6. And, now, the whole of them is not only ſubject to be *pawned* for the debts of the owner, but likewiſe to be abſolutely *ſold* for the benefit of trade and commerce by the ſeveral ſtatutes of bankruptcy: The reſtraint of *deviſing* lands by will, except in ſome places by particular cuſtom, laſted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued ſtill later than any of the reſt, and became extremely troubleſome, though many methods were invented to evade them; till at laſt, they were made no longer neceſſary to complete the grant or conveyance, by ſtatute 4 & 5 Ann. c. 16. nor ſhall, by ſtatute 11 Geo. II. c. 19. the attornment of any tenant affect the poſſeſſion of any lands, unleſs made with conſent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of juſtice.

IN examining the nature of alienation, let us firſt inquire, briefly, who may aliene and to *whom;* and then, more largely, *how* a man may aliene, or the ſeveral modes of conveyance.

I. WHO may aliene, and to whom: or, in other words, who is capable of conveying and who of purchaſing. And herein we muſt conſider rather the incapacity, than capacity, of the ſeveral parties: for all perſons in *poſſeſſion* are *prima facie* capable both of conveying and purchaſing, unleſs the law has laid them under any particular diſabilities. But, if a man has only in him the *right* of either poſſeſſion or property, he cannot convey it to any other, leſt pretended titles might be granted to great men, whereby juſtice might be trodden down, and the weak oppreſſed [s]. Yet reverſions and veſted remainders may be granted; becauſe the poſſeſſion of the particular tenant is the poſſeſſion of him in reverſion or remainder: but *contingencies*, and mere *poſſibilities*, though they may be releaſed, or deviſed by will, or may paſs to the heir or executor, yet cannot (it hath been ſaid) be aſſigned to a ſtranger, unleſs coupled with ſome preſent intereſt [t].

PERSONS attainted of treaſon, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows [u]: for ſuch conveyance by them

s Co. Litt. 214.

t Sheppard's touchſtone. 238, 239. Stra. 132. 322. 11 Mod. 152. 1 P. Wms. 54.

u Co. Litt. 42.

them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime [u]. So also corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

IDIOTS and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts [w]. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to alledge his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I, *non compos* was a sufficient plea to avoid a man's own bond [x]: and there is a writ in the register [y] for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suae, ut dicit, &c.* But under Edward III a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity [z]: and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it [a]. Under Henry VI this way of

u *Ibid.* 2.

w *Ibid.* 247.

x Britton. *c.* 28. *fol.* 66.

y *fol.* 228. See also *Memorand. Scacch.* 22 *Edw.* I. (prefixed to Maynard's yearbook Edw. II.) *fol.* 23.

z 5 *Edw. III.* 70.

a 35 *Assis. pl.* 10.

reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument [b]; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason [c], the maxim that a man shall not stultify himself hath been handed down as settled law [d]: though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it [e]. And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant [f]: And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option [g]. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him [h]. Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased [i]. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecillity of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecillity ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c. 20. are impowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs, or executors.

THE case of a feme-covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids

b 39 *Hen. VI.* 42.
c F. N. B. 202.
d Litt. §. 405. Cro. Eliz. 398. 4 Rep. 123. Jenk. 40.
e Comb. 469. 3 Mod. 310, 311. 1 Equ. cas. abr. 279.
f Perkins. §. 21.
g Co. Litt. 2.
h *Ibid.*
i 2 Inst. 483. 5 Rep. 119.

it by some act declaring his dissent [k]. And, though he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement [l]. But the *conveyance* or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable [m]; and therefore cannot be affirmed or made good by any subsequent agreement.

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can *hold* nothing except a lease for years of a house for convenience of merchandize, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited to the king [n].

PAPISTS, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60. within the time limited for that purpose, are by statute 11 & 12 W. III. c. 4. disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void [o].

II. WE are next, but principally, to inquire, *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

IN consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed, was that of occupancy or first possession. But this possession, when once

k Co. Litt. 3.
l *Ibid.*
m Perkins. §. 154. 1 Sid. 120.
n Co. Litt. 2.
o 1 P. Wms. 354.

gained, was alſo neceſſarily to be continued; or elſe, upon one man's dereliction of the thing he had ſeiſed, it would again become common, and all thoſe miſchiefs and contentions would enſue, which property was introduced to prevent. For this purpoſe therefore, of continuing the poſſeſſion, the municipal law has eſtabliſhed *deſcents* and *alienations*: the former to continue the poſſeſſion in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in thoſe perſons, to whom the proprietor, by his own *voluntary* act, ſhall chooſe to relinquiſh it in his life-time. A tranſlation, or transfer, of property being thus admitted by law, it became neceſſary that this transfer ſhould be properly evidenced: in order to prevent diſputes, either about the fact, as whether there was any transfer at all; or concerning the perſons, by whom and to whom it was transferred; or with regard to the ſubject matter, as what the thing transferred conſiſted of; or, laſtly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what eſtate and intereſt) the conveyance was made. The legal evidences of this tranſlation of property are called the *common aſſurances* of the kingdom; whereby every man's eſtate is aſſured to him, and all controverſies, doubts, and difficulties are either prevented or removed.

THESE common aſſurances are of four kinds: 1. By matter *in pais*, or deed; which is an aſſurance tranſacted between two or more private perſons *in pais*, in the country; that is (according to the old common law) upon the very ſpot to be transferred. 2. By matter of *record*, or an aſſurance tranſacted only in the king's public courts of record. 3. By ſpecial *cuſtom*, obtaining in ſome particular places, and relating only to ſome particular ſpecies of property. Which three are ſuch as take effect during the life of the party conveying or aſſuring. 4. The fourth takes no effect, till after his death; and that is by *deviſe*, contained in his laſt will and teſtament. We ſhall treat of each in it's order.

CHAPTER THE TWENTIETH.

OF ALIENATION BY DEED.

IN treating of deeds I ſhall conſider, firſt, their general nature; and, next, the ſeveral ſorts or kinds of deeds, with their reſpective incidents. And in explaining the former, I ſhall examine, firſt, what a deed is; ſecondly, it's requiſites; and, thirdly, how it may be avoided.

I. FIRST then, a deed is a writing ſealed and delivered by the parties [a]. It is ſometimes called a charter, *carta*, from it's materials; but moſt uſually, when applied to the tranſactions of private ſubjects, it is called a deed, in Latin *factum*, κατ' ἐξοχην, becauſe it is the moſt ſolemn and authentic act that a man can poſſibly perform, with relation to the diſpoſal of his property; and therefore a man ſhall always be *eſtopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once ſo ſolemnly and deliberately avowed [b]. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each ſhould be cut or indented (formerly in acute angles *inſtar dentium*, like the teeth of a ſaw, but at preſent in a waving line) on the top or ſide, to tally or correſpond with the other; which deed, ſo made, is called an indenture. Formerly, when deeds were more conciſe than at preſent, it was uſual to write both parts on the ſame piece of parchment, with ſome word or letters of the alphabet written between them; through which the parchment was cut, either in a ſtrait or indented line, in ſuch a manner as to leave half the word on

[a] Co. Litt. 171.

[b] Plowd. 434.

one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists [c]; and with us *chirographa*, or hand-writings [d]; the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed-poll*, or a single deed [e].

II. WE are in the next place to consider the *requisites* of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter to be contracted for; all which must be expressed by sufficient names [f]. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

SECONDLY; the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract [g]; nor upon fraud or collusion, either to deceive purchasors *bona fide* [h], or just and lawful creditors [i]; any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to inure, or to be effectual, only to the use of the grantor himself [k]. The

[c] Lyndew. *l.* 1. *t.* 10. *c.* 1.
[d] Mirror. *c.* 2. §. 27.
[e] *Ibid.* Litt. §. 371, 372.
[f] Co. Litt. 35.
[g] Stat. 13 Eliz. c. 8.
[h] Stat. 27 Eliz. c. 4.
[i] Stat. 13 Eliz. c. 5.
[k] Perk. §. 533.

consideration

consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant [l]; and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bona fide* purchasors.

THIRDLY; the deed must be *written*, or I presume *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed [m]. Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3. enacts, that no lease estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY; the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties: which suffici-

l 3 Rep. 83.

m Co. Litt. 229. F. N. B. 122.

ency

ency muſt be left to the courts of law to determine [n]. For it is not abſolutely neceſſary in law, to have all the formal parts that are uſually drawn out in deeds, ſo as there be ſufficient words to declare clearly and legally the party's meaning. But, as theſe formal and orderly parts are calculated to convey that meaning in the cleareſt, diſtincteſt, and moſt effectual manner, and have been well conſidered and ſettled by the wiſdom of ſucceſſive ages, it is prudent not to depart from them without good reaſon or urgent neceſſity; and therefore I will here mention them in their uſual [o] order.

1. THE *premiſes* may be uſed to ſet forth the number and names of the parties, with their additions or titles. They alſo contain the recital, if any, of ſuch deeds, agreements, or matters of fact, as are neceſſary to explain the reaſons upon which the preſent tranſaction is founded: and herein alſo is ſet down the conſideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted [p].

2, 3. NEXT come the *habendum* and *tenendum* [q]. The office of the *habendum* is properly to determine what eſtate or intereſt is granted by the deed: though this may be performed, and ſometimes is performed, in the premiſes. In which caſe the *habendum* may leſſen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the eſtate granted in the premiſes. As if a grant be "to A and "the heirs of his body," in the premiſes, *habendum* "to him "and his heirs for ever," or *vice verſa*; here A has an eſtate-tail, and a fee-ſimple expectant thereon [r]. But, had it been in the premiſes "to him and his heirs," *habendum* "to him "for life," the *habendum* would be utterly void [s]; for an eſtate of inheritance is veſted in him before the *habendum* comes, and ſhall not afterwards be taken away, or deveſted, by it. The *tenendum* "and to hold," is now of very little uſe, and is only kept in by cuſtom. It was ſometimes for-

n Co. Litt. 225.

o *Ibid.* 6.

p See appendix, N°. II. §. 2. pag. v.

q *Ibid.*

r Co. Litt. 21. 2 Roll. Rep. 19. 23. Cro. Jac. 476.

s 2 Rep. 23. 8 Rep. 56.

merly used to signify the tenure, by which the estate granted was to be holden; *viz.* "*tenendum per servitium militare, in* "*burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores;* 18 Edw. I. it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasors to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi* [t]; but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. NEXT follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings, or "a pepper corn, or two days ploughing, or the like [u]." Under the pure feodal system, this render, *reditus*, return, or rent, consisted in chivalry principally of military services; in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, or of any other certain profit [w]. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed [x]. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee [y].

5. ANOTHER of the terms upon which a grant may be made is a *condition;* which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the mort-

t Append. N°. I. Madox. *Formul. passim.*

u Append. N°. II. §. 1. pag. iii.

w See pag. 41.

x Plowd. 13. 8 Rep. 71.

y Append. N°. I. pag. i.

"gagee

"gagee 500 *l*, upon such a day, the whole estate granted "shall determine;" and the like [z].

6. NEXT may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted [a]. By the feodal constitution, if the vasal's title to enjoy the feud was disputed, he might vouch, or call, the lord or donor, to warrant or insure his gift; which if he failed to do, and the vasal was evicted, the lord was bound to give him another feud of equal value in recompense [b]. And so, by our antient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered [c]. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage (which was called *homage auncestrel*) this also bound the lord to warranty [d]; the homage being an evidence of such a feodal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty [e], because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title [f]. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs [g]; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the antient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute,

z Append. N°. II. §. 2. pag. viii.
a *Ibid.* N°. I. pag. i.
b *Feud.* *l.* 2. *t.* 8, & 25.
c Co. Litt. 384.
d Litt. §. 143.
e Co. Litt. 174.
f *Ibid.* 384.
g *Ibid.*

no

no warranty whatſoever is implied [h]; they bearing no ſort of analogy to the original feodal donation. And therefore in ſuch caſes it became neceſſary to add an expreſs clauſe of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant* [i].

THESE expreſs warranties were introduced, even prior to the ſtatute of *quia emptores*, in order to evade the ſtrictneſs of the feodal doctrine of non-alienation without the conſent of the heir. For, though he, at the death of his anceſtor, might have entered on any tenements that were aliened without his concurrence, yet, if a clauſe of warranty was added to the anceſtor's grant, this covenant deſcending upon the heir inſured the grantee; not ſo much by confirming his title, as by obliging ſuch heir to yield him a recompenſe in lands of equal value: the law, in favour of alienations, ſuppoſing that no anceſtor would wantonly diſinherit his next of blood [k]; and therefore preſuming that he had received a valuable conſideration, either in land, or in money which had purchaſed land, and that this equivalent deſcended to the heir together with the anceſtor's warranty. So that when either an anceſtor, being the rightful tenant of the freehold, conveyed the land to a ſtranger and his heirs, or releaſed the right in fee-ſimple to one who was already in poſſeſſion, and ſuperadded a warranty to his deed, it was held that ſuch warranty not only bound the warrantor himſelf to protect and aſſure the title of the warrantee, but it alſo bound his heir: and this, whether that warranty was *lineal*, or *collateral* to the title of the land. *Lineal* warranty was where the heir derived, or might by poſſibility have derived, his title to the land warranted, either from or through the anceſtor who made the warranty: as where a father, or an elder ſon in the life of the father, releaſed to the diſſeiſor of either themſelves or the grandfather, with warranty, this was lineal to the younger ſon [l]. *Collateral* warranty was where the heir's title to the land neither was, nor

h Co. Litt. 102.

i Litt. §. 733.

k Co. Litt. 373.

l Litt. §. 703. 706, 707.

could have been, derived from the warranting anceſtor; as where a younger brother releaſed to his father's diſſeiſor, with warranty, this was collateral to the elder brother[m]. But where the very conveyance, to which the warranty was annexed, immediately followed a diſſeiſin, or operated itſelf as ſuch (as, where a father tenant for years, with remainder to his ſon in fee, aliened in fee-ſimple with warranty) this, being in it's original manifeſtly founded on the *tort* or wrong of the warrantor himſelf, was called a warranty *commencing by diſſeiſin*; and, being too palpably injurious to be ſupported, was not binding upon any heir of ſuch tortious warrantor[n].

IN both lineal and collateral warranty, the obligation of the heir (in caſe the warrantee was evicted, to yield him other lands in their ſtead) was only on condition that he had other ſufficient lands by deſcent from the warranting anceſtor[o]. But though, without aſſets, he was not bound to inſure the title of *another*, yet, in caſe of lineal warranty, whether aſſets deſcended or not, the heir was perpetually barred from claiming the land *himſelf*; for, if he could ſucceed in ſuch claim, he would then gain aſſets by deſcent, (if he had them not before) and muſt fulfil the warranty of his anceſtor: and the ſame rule[p] was with leſs juſtice adopted alſo in reſpect of collateral warranties, which likewiſe (though no aſſets deſcended) barred the heir of the warrantor from claiming the land by any collateral title; upon the preſumption of law that he might hereafter have aſſets by deſcent either from or through the ſame anceſtor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curteſy took upon them to aliene their lands with warranty; which collateral warranty of the father deſcending upon his ſon (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the ſtatute of Glouceſter, 6 Edw. I. c. 3. declared, that ſuch warranty ſhould be no bar to the ſon, unleſs aſſets deſcended from the father. It was afterwards attempted in 50 Edw. III.

m Litt. §. 705. 707.
n Ibid. §. 698. 702.
o Co. Litt. 102.
p Litt. §. 711, 712.

to

to make the ſame proviſion univerſal, by enacting that no collateral warranty ſhould be a bar, unleſs where aſſets deſcended from the ſame anceſtor [q]; but it then proceeded not to effect. However, by the ſtatute 11 Hen. VII. c. 20. notwithſtanding any alienation with warranty by tenant in dower, the heir of the huſband is not barred, though he be alſo heir to the wife. And by ſtatute 4 & 5 Ann. c. 16. all warranties by any tenant for life ſhall be void againſt thoſe in remainder or reverſion; and all collateral warranties by any anceſtor who has no eſtate of inheritance in poſſeſſion ſhall be void againſt his heir. By the wording of which laſt ſtatute it ſhould ſeem, that the legiſlature meant to allow, that the collateral warranty of tenant in tail in poſſeſſion, deſcending (though without aſſets) upon a remainder-man or reverſioner, ſhould ſtill bar the remainder or reverſion. For though the judges, in expounding the ſtatute *de donis*, held that, by analogy to the ſtatute of Glouceſter, a lineal warranty by the tenant in tail without aſſets ſhould not bar the iſſue in tail, yet they held ſuch warranty with aſſets to be a ſufficient bar [r]: which was therefore formerly mentioned [s] as one of the ways whereby an eſtate-tail might be deſtroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They alſo held, that collateral warranty was not within the ſtatute *de donis*; as that act was principally intended to prevent the tenant in tail from diſinheriting his own iſſue: and therefore collateral warranty (though without aſſets) was allowed to be, as at common law, a ſufficient bar of the eſtate tail and all remainders and reverſions expectant thereon [t]. And ſo it ſtill continues to be, notwithſtanding the ſtatute of queen Anne, if made by tenant in tail in poſſeſſion: who therefore may now, without the forms of a fine or recovery, in ſome caſes make a good conveyance in fee-ſimple, by ſuperadding a warranty to his grant; which, if accompanied with aſſets, bars his own iſſue, and without them bars ſuch of his heirs as may be in remainder or reverſion.

[q] Co. Litt. 373.

[r] Litt. §. 712. 2 Inſt. 293.

[s] pag. 116.

[t] Co. Litt. 374. 2 Inſt. 335.

7. AFTER warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c[u]. If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

8. LASTLY, comes the *conclusion*, which mentions the execution and date of the deed, or the time of it's being given or executed, either expressly, or by reference to some day and year before-mentioned[w]. Not but a deed is good, although it mention no date: or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of it's being dated or given, that is delivered, can be proved[x].

I PROCEED now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party[y].

u Append. N°. II. §. 2. pag. viii.
w *Ibid.* pag. xii.
x Co. Litt. 46. Dyer. 28.
y 2 Rep. 3. 9. 11 Rep. 27.

SIXTHLY,

SIXTHLY, it is requiſite that the party, whoſe deed it is, ſhould *ſeal*, and now in moſt caſes I apprehend ſhould *ſign* it alſo. The uſe of ſeals, as a mark of authenticity to letters and other inſtruments in writing, is extremely antient. We read of it among the Jews and Perſians in the earlieſt and moſt ſacred records of hiſtory[z]. And in the book of Jeremiah there is a very remarkable inſtance, not only of an atteſtation by ſeal, but alſo of the other uſual formalities attending a Jewiſh purchaſe[a]. In the civil law alſo[b], ſeals were the evidence of truth; and were required, on the part of the witneſſes at leaſt, at the atteſtation of every teſtament. But in the times of our Saxon anceſtors, they were not much in uſe in England. For though ſir Edward Coke[c] relies on an inſtance of king Edwin's making uſe of a ſeal about an hundred years before the conqueſt, yet it does not follow that this was the uſage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumſtance, of being ſealed; ſince we are aſſured by all our antient hiſtorians, that ſealing was not then in common uſe. The method of the Saxons was for ſuch as could write to ſubſcribe their names, and, whether they could write or not, to affix the ſign of the croſs: which cuſtom our illiterate vulgar do, for the moſt part, to this day keep up; by ſigning a croſs for their mark, when unable to write their names. And indeed this inability to write, and therefore making a croſs in it's ſtead, is honeſtly avowed by Caedwalla, a Saxon king, at the end of one of his charters[d]. In like manner, and for the ſame unſurmountable reaſon, the Normans, a brave but illiterate nation, at their firſt ſettlement in France, uſed the

z 1 Kings. c. 21. Daniel. c. 6. Eſther. c. 8.

a "And I bought the field of Hanameel, and weighed him the money, even ſeventeen ſhekels of ſilver. And I ſubſcribed the evidence, and ſealed it and took witneſſes, and weighed him the money in the ballances. And I took the evidence of the purchaſe, both that which was ſealed according to the law and cuſtom, and alſo that which was open." c. 32.

b *Inſt.* 2. 10. 2 & 3.

c 1 *Inſt.* 7.

d "*Propria manu pro ignorantia literarum ſignum ſanctae crucis expreſſi et ſubſcripſi.*" Seld. *Jan. Ang. l.* 1. §. 42. And this (according to Procopius) the emperor Juſtin in the eaſt, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

practice of sealing only, without writing their names: which custom continued, when learning made it's way among them, though the reason for doing it had ceased; and hence the charter of Edward the confessor to Westminster abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England[e]. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English methods of writing their names, and signing with the sign of the cross[f]. And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals[g]. The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

THIS neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds,—"*sealed* and delivered," continues to this day; notwithstanding the statute 29 Car. II. c. 3. before-mentioned revives the Saxon custom, and expresly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other[h].

A SEVENTH requisite to a good deed is that it be *delivered*, by the party himself or his certain attorney: which therefore is also

e Lamb. *Archeion.* 51.

f "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in ceram impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

g Stat. Exon. 14 Edw. I.

h 3 Lev. 1. Stra. 764.

alſo expreſſed in the atteſtation; "ſealed and *delivered.*" A deed takes effect only from this tradition or delivery; for if the date be falſe or impoſſible, the delivery aſcertains the time of it. And if another perſon ſeals the deed, yet if the party delivers it himſelf, he thereby adopts the ſealing [j], and by a parity of reaſon the ſigning alſo, and makes them both his own. A delivery may be either abſolute, that is, to the party or grantee himſelf; or to a third perſon, to hold till ſome conditions be performed on the part of the grantee: in which laſt caſe it is not delivered as a *deed*, but as an *eſcrow*; that is, as a ſcrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purpoſes [i].

THE *laſt* requiſite to the validity of a deed is the *atteſtation*, or execution of it *in the preſence of witneſſes*: though this is neceſſary, rather for preſerving the evidence, than for conſtituting the eſſence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia teſtata* mentioned by the feodal writers [k]; which were written memorandums, introduced to perpetuate the tenor of the conveyance and inveſtiture, when grants by parol only became the foundation of frequent diſpute and uncertainty. To this end they regiſtered in the deed the perſons who attended as witneſſes, which was formerly done without their ſigning their names (that not being always in their power) but they only heard the deed read; and then the clerk or ſcribe added their names, in a ſort of memorandum; thus: "*hijs teſtibus* "*Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis* [l]." This, like all other ſolemn tranſactions, was originally done only *coram paribus* [m], and frequently when aſſembled in the court baron, hundred, or county court; which was then expreſſed in the atteſtation, *teſte comitatu, hundredo, &c* [n]. Afterwards the atteſtation of other witneſſes was allowed, the trial in

j Perk. §. 130.
i Co. Litt. 36.
k *Feud. l.* 1. *t.* 4.
l Co. Litt. 7.
m *Feud. l.* 2. *t.* 32.
n Spelm. *Gloſſ.* 228. Madox. *Formul.* n°. 221, 322. 660.

case of a dispute being still reserved to the *pares;* with whom the witnesses (if more than one) were associated and joined in the verdict [o]: till that also was abrogated by the statute of York, 12 Edw. II. st. 1. c. 2. And in this manner, with some such clause of *hijs testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of sir Edward Coke, creations of nobility were still witnessed in the same manner [p]. But in the king's common charters, writs, or letters patent, the stile is now altered: for at present the king is his own witness, and attests his letters patent thus: "*teste meipse*, witness ourself at Westminster, *&c.*" a form which was introduced by Richard the first [q], but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijs testibus* entirely discontinued till the reign of Henry the eighth [r]: which was also the æra of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed [s].

III. WE are next to consider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation [t]. 2. By breaking off, or defacing the seal [u]. 3. By delivering it up to be cancelled;

[o] Co. Litt. 6.
[p] 2 Inst. 77.
[q] Madox. *Formul.* n°. 515.
[r] *Ibid.* Differt. fol. 32.
[s] 2 Inst. 78. See page 378.
[t] 11 Rep. 27.
[u] 5 Rep. 23.

that is to have lines drawn over it in the form of lattice work or *cancelli;* though the phrafe is now ufed figuratively for any manner of obliteration or defacing it. 4. By the difagreement of fuch, whofe concurrence is neceffary, in order for the deed to ftand: as the hufband, where a feme-covert is concerned; an infant, or perfon under durefs, when thofe difabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was antiently the province of the court of ftar chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an abfolute forgery [w]. In any of thefe cafes the deed may be voided, either in part or totally, according as the caufe of avoidance is more or lefs extenfive.

AND, having thus explained the general nature of deeds, we are next to confider their feveral fpecies, together with their refpective incidents. And herein I fhall only examine the particulars of thofe, which, from long practice and experience of their efficacy, are generally ufed in the alienation of *real* eftates: for it would be tedious, nay infinite, to defcant upon all the feveral inftruments made ufe of in *perfonal* concerns, but which fall under our general definition of a deed; that is, a writing fealed and delivered. The former, being principally fuch as ferve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances:* which are either conveyances at *common law*, or fuch as receive their force and efficacy by virtue of the *ftatute of ufes.*

I. OF conveyances by the common law, fome may be called *original*, or *primary* conveyances; which are thofe by means whereof the benefit or eftate is created or firft arifes: others are *derivative*, or *fecondary*; whereby the benefit or eftate, originally created, is enlarged, reftrained, transferred, or extinguifhed.

[w] Toth. *numo.* 24. 1 Vern. 348.

ORIGINAL conveyances are the following; 1. Feoffment; 2. Gift; 3. Grant; 4. Leafe; 5. Exchange; 6. Partition; *derivative* are, 7. Releafe; 8. Confirmation; 9. Surrender; 10. Affignment; 11. Defeazance.

1. A FEOFFMENT, *feoffamentum*, is a fubftantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi* [x]. It is the moft antient method of conveyance, the moft folemn and public, and therefore the moft eafily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that fo gives, or enfeoffs, is called the *feoffor*: and the perfon enfeoffed is denominated the *feoffee*.

THIS is plainly derived from, or is indeed itfelf the very mode of the antient feodal donation; for though it may be performed by the word, "*enfeoff*" or "grant," yet the apteft word of feoffment is, "*do* or *dedi* [y]." And it is ftill directed and governed by the fame feodal rules; infomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor eft qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi* [z]." And therefore as in pure feodal donations the lord, from whom the feud moved, muft exprefsly limit and declare the continuance or quantity of eftate which he meant to confer, "*ne quis plus donaffe praefumatur, quam in donatione expresferit* [a];" fo, if one grants by feoffment lands or tenements to another, and limits or expreffes no eftate, the grantee (due ceremonies of law being performed) hath barely an eftate for life [b]. For, as the perfonal abilities of the feoffee were originally prefumed to be the immediate or principal inducements to the feoffment, the feoffee's eftate ought to be confined to his perfon and fubfift only for his life; unlefs the feoffor, by exprefs pro-

x Co. Litt. 9.
y *Ibid.*
z Wright. 21.
a pag. 108.
b Co. Litt. 42.

vifion

viſion in the creation and conſtitution of the eſtate, hath given it a longer continuance. Theſe expreſs proviſions are indeed generally made; for this was for ages the only conveyance, whereby our anceſtors were wont to create an eſtate in fee-ſimple [c], by giving the land to the feoffee, to hold to him and his heirs for ever; though it ſerves equally well to convey any other eſtate or freehold [d].

BUT by the mere words of the deed the feoffment is by no means perfected, there remains a very material ceremony to be performed, called *livery of ſeiſin;* without which the feoffee has but a mere eſtate at will [e]. This livery of ſeiſin is no other than the pure feodal inveſtiture, or delivery of corporal poſſeſſion of the land or tenement; which was held abſolutely neceſſary to complete the donation. "*Nam feudum* "*ſine inveſtitura nullo modo conſtitui potuit* [f]:" and an eſtate was then only perfect, when, as the author of Fleta expreſſes it in our law, "*fit juris et ſeiſinae conjunctio* [g]."

INVESTITURES, in their original riſe, were probably intended to demonſtrate in conquered countries the actual poſſeſſion of the *lord;* and that he did not grant a bare litigious right, which the ſoldier was ill qualified to proſecute, but a peaceable and firm poſſeſſion. And at a time when writing was ſeldom practiſed, a mere oral gift, at a diſtance from the ſpot that was given, was not likely to be either long or accurately retained in the memory of by-ſtanders, who were very little intereſted in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and teſtify the transfer of the eſtate: and that ſuch, as claimed title by other means, might know againſt whom to bring their actions.

IN all well-governed nations, ſome notoriety of this kind has been ever held requiſite, in order to acquire and aſcertain

c See Appendix, No. I.
d Co. Litt. 9.
e Litt. §. 66.
f Wright. 37.
g *l.* 3. *c.* 15. §. 5.

the property of lands. In the Roman law *plenum dominium* was not ſaid to ſubſiſt, unleſs where a man had both the *right* and the *corporal poſſeſſion;* which poſſeſſion could not be acquired without both an actual intention to poſſeſs, and an actual ſeiſin, or entry into the premiſes, or part of them, in the name of the whole [h]. And even in eccleſiaſtical promotions, where the freehold paſſes to the perſon promoted, corporal poſſeſſion is required at this day, to veſt the property completely in the new proprietor; who, according to the diſtinction of the canoniſts [i], acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and inſtitution; but not the *jus in re*, or complete and full right, unleſs by corporal poſſeſſion. Therefore in dignities poſſeſſion is given by inſtallment; in rectories and vicarages by induction, without which no temporal rights accrue to the miniſter, though every eccleſiaſtical power is veſted in him by inſtitution. So alſo even in deſcents of lands by our law, which are caſt on the heir by act of the law itſelf, the heir has not *plenum dominium*, or full and complete ownerſhip, till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir ſhall not be entitled to take the poſſeſſion, but the heir of the perſon who was laſt actually ſeiſed [k]. It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner; ſo as to tranſmit the inheritance to his own heirs: *non jus, ſed ſeiſina, facit ſtipitem* [l].

YET, the corporal tradition of lands being ſometimes inconvenient, a ſymbolical delivery of poſſeſſion was in many caſes antiently allowed; by transferring ſomething near at hand, in the preſence of credible witneſſes, which by agreement ſhould ſerve to repreſent the very thing deſigned to be conveyed; and an occupancy of this ſign or ſymbol was per-

[h] *Nam apiſcimur poſſeſſionem corpore et animo; neque per ſe corpore, neque per ſe animo. Non autem ita accipiendum eſt, ut qui fundum poſſidere velit, omnes glebas circumambulet; ſed ſufficit quamlibet partem ejus fundi introire.* (*Ff.* 41, 2, 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (*Cod.* 2, 3. 20.)

[i] Decretal. *l.* 3. *t.* 4. *c.* 40.

[k] See pag. 209. 227, 228.

[l] Flet. *l.* 6. *c.* 2. §. 2.

mitted as equivalent to occupancy of the land itſelf. Among the Jews we find the evidence of a purchaſe thus defined in the book of Ruth [m]: "now this was the manner in former time in Iſrael, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his ſhoe, and gave it to his neighbour; and this was a teſtimony in Iſrael." Among the antient Goths and Swedes, contracts for the ſale of lands were made in the preſence of witneſſes who extended the cloak of the buyer, while the ſeller caſt a clod of the land into it, in order to give poſſeſſion; and a ſtaff or wand was alſo delivered from the vendor to the vendee, which paſſed through the hands of the witneſſes [n]. With our Saxon anceſtors the delivery of a turf was a neceſſary ſolemnity, to eſtabliſh the conveyance of lands [o]. And, to this day, the conveyance of our copyhold eſtates is uſually made from the ſeller to the lord or his ſteward by delivery of a rod or verge, and then from the lord to the purchaſor by re-delivery of the ſame, in the preſence of a jury of tenants.

CONVEYANCES in writing were the laſt and moſt refined improvement. The mere delivery of poſſeſſion, either actual or ſymbolical, depending on the ocular teſtimony and remembrance of the witneſſes, was liable to be forgotten or miſrepreſented, and became frequently incapable of proof. Beſides, the new occaſions and neceſſities, introduced by the advancement of commerce, required means to be deviſed of charging and incumbering eſtates, and of making them liable to a multitude of conditions and minute deſignations for the purpoſes of raiſing money, without an abſolute ſale of the land; and ſometimes the like proceedings were found uſeful in order to make a decent and competent proviſion for the numerous branches of a family, and for other domeſtic views. None of which could be effected by a mere, ſimple, corporal transfer of the ſoil from one man to another, which was principally calculated for conveying an abſolute unlimited dominion. Writ-

[m] ch. 4. v. 7.

[n] Stiernhook. *de jure Sueon. l.* 2. *c.* 4.

[o] Hickes *Differt. Epiſtolar.* 85.

ten

ten deeds were therefore introduced, in order to ſpecify and perpetuate the peculiar purpoſes of the party who conveyed: yet ſtill, for a very long ſeries of years, they were never made uſe of, but in company with the more antient and notorious method of transfer, by delivery of corporal poſſeſſion.

LIVERY of ſeiſin, by the common law, is neceſſary to be made upon every grant of an eſtate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impoſſible to be made; for they are not the object of the ſenſes: and in leaſes for years, or other chattel intereſts, it is not neceſſary. In leaſes for years indeed an actual *entry* is neceſſary, to veſt the eſtate in the leſſee; for the bare leaſe gives him only a right to enter, which is called his intereſt in the term, or *intereſſe termini*: and, when he enters in purſuance of that right, he is then and not before in poſſeſſion of his term, and complete tenant for years [p]. This entry by the tenant himſelf ſerves the purpoſe of notoriety, as well as livery of ſeiſin from the grantor could have done; which it would have been improper to have given in this caſe, becauſe that ſolemnity is appropriated to the conveyance of a freehold. And this is one reaſon why freeholds cannot be made to commence *in futuro*, becauſe they cannot (at the common law) be made but by livery of ſeiſin; which livery, being an actual manual tradition of the land, muſt take effect *in praeſenti*, or not at all [q].

ON the creation of a *freehold* remainder, at one and the ſame time with a particular eſtate for years, we have before ſeen that at the common law livery muſt be made to the particular tenant [r]. But if ſuch a remainder be created afterwards, expectant on a leaſe for years now in being, the livery muſt not be made to the leſſee for years, for then it operates nothing; "*nam quod ſemel meum eſt, amplius meum* "*eſſe non poteſt* [s];" but it muſt be made to the remainder-man himſelf,

[p] Co. Litt. 46.
[q] See pag. 165.
[r] pag. 167.
[s] Co. Litt. 49.

himself, by consent of the lessee for years: for without his consent no livery of the possession can be given [t]; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given [u] for introducing the doctrine of attornments.

LIVERY of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done, by deputy or attorney, as by the principals themselves in person) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect; "I deliver these to you in the "name of seisin of all the lands and tenements contained in "this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others [w]. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all [x]; but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anticntly this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feodal law [y], *pares debent interesse investiturae feudi, et non alii:* for which this reason is expresly given; because

[t] Co. Litt. 48.
[u] pag. 288.
[w] Co. Litt. 48. West. Symb. 251.
[x] Litt. §. 414.
[y] *Feud. l.* 2. *t.* 58.

the peers or vaſals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which ſtrangers might be apt to connive at. And though afterwards, the ocular atteſtation of the *pares* was held unneceſſary, and livery might be made before any credible witneſſes, yet the trial, in caſe it was diſputed, (like that of all other atteſtations [z]) was ſtill reſerved to the *pares* or jury of the county [a]. Alſo, if the lands be out on leaſe, though all lie in the ſame county, there muſt be as many liveries as there are tenants: becauſe no livery can be made in this caſe, but by the conſent of the particular tenant; and the conſent of one will not bind the reſt [b]. And in all theſe caſes it is prudent, and uſual, to endorſe the livery of ſeiſin on the back of the deed, ſpecifying the manner, place, and time of making it; together with the names of the witneſſes [c]. And thus much for livery in deed.

LIVERY in *law* is where the ſame is not made *on* the land, but *in ſight of it* only; the feoffor ſaying to the feoffee, "I "give you yonder land, enter and take poſſeſſion." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwiſe; unleſs he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as poſſible to the lands [d], will ſuffice without an entry [e]. This livery in law cannot however be given or received by attorney, but only by the parties themſelves [f].

2. THE conveyance by *gift*, *donatio*, is properly applied to the creation of an eſtate-tail, as feoffment is to that of an eſtate in fee, and leaſe to that of an eſtate for life or years. It differs in nothing from a feoffment, but in the nature of the eſtate paſſing by it: for the operative words of conveyance in this caſe are *do* or *dedi* [g]; and gifts in tail are equally imperfect without livery of ſeiſin, as feoffments in fee-ſimple [h].

z See pag. 307.
a Gilb. 10. 35.
b Dyer. 18.
c See Appendix. N°. I.
d Litt. §. 421, *&c.*
e Co. Litt. 48.
f *Ibid.* 52.
g Weſt. Symbol. 256.
h Litt. §. 59.

And

And this is the only diſtinction that Littleton ſeems to take, when he ſays [i], "it is to be underſtood that there is feoffor "and feoffee, donor and donee, leſſor and leſſee;" *viz.* feoffor is applied to a feoffment in fee-ſimple, donor to a gift in tail, and leſſor to a leaſe for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next ſpecies of deeds: which are,

3. GRANTS, *conceſſiones;* the regular method by the common law of transferring the property of *incorporeal* hereditaments, or ſuch things whereof no livery can be had [k]. For which reaſon all corporeal hereditaments, as lands and houſes, are ſaid to lie *in livery;* and the others, as advowſons, commons, rents, reverſions, &c, to lie *in grant* [l]. And the reaſon is given by Bracton [m]: "*traditio,* or livery, *nihil aliud* "*eſt quam rei corporalis de perſona in perſonam, de manu in ma-* "*num, tranſlatio aut in poſſeſſionem inductio; ſed res incor-* "*porales, quae ſunt ipſum jus rei vel corpori inhaerens, tradi-* "*tionem non patiuntur.*" Theſe therefore paſs merely by the delivery of the deed. And in figniories, or reverſions of lands, ſuch grant, together with the attornment of the tenant (while attornments were requiſite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate poſſeſſion. It therefore differs but little from a feoffment, except in it's ſubject matter: for the operative words therein commonly uſed are *dedi et conceſſi,* "have given and granted."

4. A LEASE is properly a conveyance of any lands or tenements, (uſually in conſideration of rent or other annual recompenſe) made for life, for years, or at will, but always for a *leſs* time than the leſſor hath in the premiſes: for if it be for the *whole* intereſt, it is more properly an aſſignment than a leaſe. The uſual words of operation in it are, "demiſe, grant, and to farm let; *dimiſi, conceſſi, et ad firmam*

i §. 57.
k Co. Litt. 9.
l *Ibid.* 172.
m *l.* 2. *c.* 18.

"*tradidi.*"

"*tradidi.*" *Farm*, or *feorme*, is an old Saxon word signifying provisions [n]: and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments; but to no other.

WHATEVER restriction, by the severity of the feodal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration; for he hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple, such as parsons and vicars with consent of the patron and ordinary [o]. So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate

[n] Spelm. *Gl.* 229.

[o] Co. Litt. 44.

might have made what eſtates they pleaſed, without the confirmation of any other perſon whatſoever. Whereas now, by ſeveral ſtatutes, this power where it was unreaſonable, and might be made an ill uſe of, is reſtrained; and, where in the other caſes the reſtraint by the common law ſeemed too hard, it is in ſome meaſure removed. The former ſtatutes are called the *reſtraining*, the latter the *enabling* ſtatute. We will take a view of them all, in order of time.

AND, firſt, the *enabling* ſtatute, 32 Hen. VIII. c. 28. empowers three manner of perſons to make leaſes, to endure for three lives or one and twenty years, which could not do ſo before. As firſt, tenant in tail may by ſuch leaſes bind his iſſue in tail, but not thoſe in remainder or reverſion. Secondly, a huſband ſeiſed in right of his wife, in fee-ſimple or fee-tail, provided the wife joins in ſuch leaſe, may bind her and her heirs thereby. Laſtly, all perſons ſeiſed of an eſtate of fee-ſimple in right of their churches, which extends not to parſons and vicars, may (without the concurrence of any other perſon) bind their ſucceſſors. But then there muſt many requiſites be obſerved, which the ſtatute ſpecifies, otherwiſe ſuch leaſes are not binding [p]. 1. The leaſe muſt be by indenture; and not by deed poll, or by parol. 2. It muſt begin from the making, or day of the making, and not at any greater diſtance of time. 3. If there be any old leaſe in being, it muſt be firſt abſolutely ſurrendered, or be within a year of expiring. 4. It muſt be *either* for twenty-one years, *or* three lives; and not for both. 5. It muſt not exceed the term of three lives, or twenty-one years, but may be for a ſhorter term. 6. It muſt be of corporeal hereditaments, and not of ſuch things as lie merely in grant; for no rent can be reſerved thereout by the common law, as the leſſor cannot reſort to them to diſtrein [q]. 7. It muſt be of lands and tenements moſt commonly letten for twenty years

[p] Co. Litt. 44.

[q] But now by the ſtatute 5 Geo. III. c. 17. a leaſe of tithes or other incorporeal hereditaments, alone, may be granted by any biſhop or any ſuch eccleſiaſtical or eleemoſynary corporation, and the ſucceſſor ſhall be entitled to recover the rent by an action of debt, which (in caſe of a freehold leaſe) he could not have brought at the common law.

paſt; ſo that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is ſufficient. 8. The moſt uſual and cuſtomary feorm or rent, for twenty years paſt, muſt be reſerved yearly on ſuch leaſe. 9. Such leaſes muſt not be made without impeachment of waſte. Theſe are the guards, impoſed by the ſtatute (which was avowedly made for the ſecurity of farmers and the conſequent improvement of tillage) to prevent unreaſonable abuſes, in prejudice of the iſſue, the wife, or the ſucceſſor, of the reaſonable indulgence here given.

NEXT follows, in order of time, the *diſabling* or *reſtraining* ſtatute, 1 Eliz. c. 19. (made entirely for the benefit of the ſucceſſor) which enacts, that all grants by archbiſhops and biſhops (which include even thoſe confirmed by the dean and chapter; the which, however long or unreaſonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reſerving the uſual rent, ſhall be void. Concurrent leaſes, if confirmed by the dean and chapter, are held to be within the exception of this ſtatute, and therefore valid; provided they do not exceed (together with the leaſe in being) the term permitted by the act [r]. But, by a ſaving expreſsly made, this ſtatute of 1 Eliz. did not extend to grants made by any biſhop to the crown; by which means queen Elizabeth procured many fair poſſeſſions to be made over to her by the prelates, either for her own uſe, or with intent to be granted out again to her favourites, whom ſhe thus gratified without any expenſe to herſelf. To prevent which [s] for the future, the ſtatute 1 Jac. I. c. 3. extends the prohibition to grants and leaſes made to the king, as well as to any of his ſubjects.

NEXT comes the ſtatute 13 Eliz. c. 10. explained and enforced by the ſtatutes 14 Eliz. c. 11. & 14. 18 Eliz. c. 11. and 43 Eliz. c. 29. which extend the reſtrictions, laid by

[r] Co. Litt. 45.

[s] 11 Rep. 71.

the laſt mentioned ſtatute on biſhops, to certain other inferior corporations, both ſole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other eccleſiaſtical, or eleemoſynary corporations, and all parſons and vicars, are reſtrained from making any leaſes of their lands, unleſs under the following regulations: 1. They muſt not exceed twenty-one years, or three lives, from the making. 2. The accuſtomed rent, or more, muſt be yearly reſerved thereon. 3. Houſes in corporations, or market towns, may be let for forty years; provided they be not the manſion-houſes of the leſſors, nor have above ten acres of ground belonging to them; and provided the leſſee be bound to keep them in repair: and they may alſo be aliened in fee-ſimple for lands of equal value in recompenſe. 4. Where there is an old leaſe in being, no concurrent leaſe ſhall be made, unleſs where the old one will expire within three years. 5. No leaſe (by the equity of the ſtatute) ſhall be made without impeachment of waſte [t]. 6. All bonds and covenants tending to fruſtrate the proviſions of the ſtatutes of 13 & 18 Eliz. ſhall be void.

CONCERNING theſe reſtrictive ſtatutes there are two obſervations to be made. Firſt, that they do not, by any conſtruction, enable any perſons to make ſuch leaſes as they were by common law diſabled to make. Therefore a parſon, or vicar, though he is reſtrained from making longer leaſes than for twenty-one years or three lives, even *with* the conſent of patron and ordinary, yet is not enabled to make any leaſe at all, ſo as to bind his ſucceſſor, *without* obtaining ſuch conſent [u]. Secondly, that though leaſes contrary to theſe acts are declared void, yet they are good againſt the *leſſor* during his life, if he be a ſole corporation; and are alſo good againſt an aggregate corporation ſo long as the head of it lives, who is preſumed to be the moſt concerned in intereſt. For the act was intended for the benefit of the ſucceſſor only; and no man ſhall make an advantage of his own wrong [w].

t Co. Litt. 45.
u *Ibid.* 44.
w *Ibid.* 45.

THERE is yet another reſtriction with regard to college leaſes, by ſtatute 18 Eliz. ch. 6. which directs, that one third of the old rent, then paid, ſhould for the future be reſerved in wheat or malt, reſerving a quarter of wheat for each 6*s*. 8*d*. or a quarter of malt for every 5*s*; or that the leſſees ſhould pay for the ſame according to the price that wheat and malt ſhould be ſold for, in the market next adjoining to the reſpective colleges, on the market-day before the rent becomes due. This is ſaid [x] to have been an invention of lord treaſurer Burleigh, and ſir Thomas Smith, then principal ſecretary of ſtate; who, obſerving how greatly the value of money had ſunk, and the price of all proviſions riſen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increaſe to a greater degree) deviſed this method for upholding the revenues of colleges. Their foreſight and penetration has in this reſpect been very apparent: for, though the rent ſo reſerved in corn was at firſt but one third of the old rent, or half of what was ſtill reſerved in money, yet now the proportion is nearly inverted; and the money ariſing from corn rents is, *communibus annis*, almoſt double to the rents reſerved in money.

THE leaſes of beneficed clergymen are farther reſtrained, in caſe of their non-reſidence, by ſtatutes 13 Eliz. c. 20. 14 Eliz. c. 11. 18 Eliz. c. 11. and 43 Eliz. c. 9. which direct, that if any beneficed clergyman be abſent from his cure above fourſcore days in any one year, he ſhall not only forfeit one year's profit of his benefice, to be diſtributed among the poor of the pariſh; but that all leaſes made by him, of the profits of ſuch benefice, and all covenants and agreements of like nature, ſhall ceaſe and be void: except in the caſe of licenſed pluraliſts, who are allowed to demiſe the living, on which they are non-reſident, to their curates only; provided ſuch curates do not abſent themſelves above

[x] Strype's annals of Eliz.

forty

forty days in any one year. And thus much for leafes, with their feveral enlargements and reftrictions [y].

5. AN *exchange* is a mutual grant of equal interefts, the one in confideration of the other. The word "exchange" is fo individually requifite and appropriated by law to this cafe, that it cannot be fupplied by any other word or expreffed by any circumlocution [z]. The eftates exchanged muft be equal in quantity [a]; not of *value*, for that is immaterial, but of *intereft*; as fee-fimple for fee-fimple, a leafe for twenty years for a leafe for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery [b]. But no livery of feifin, even in exchanges of freehold, is neceffary to perfect the conveyance [c]: for each party ftands in the place of the other and occupies his right, and each of them hath already had corporal poffeffion of his own land. But entry muft be made on both fides; for, if either party die before entry, the exchange is void, for want of fufficient notoriety [d]. And fo alfo, if two parfons, by confent of patron and ordinary, exchange their preferments; and the one is prefented, inftituted, and inducted, and the other is prefented, and inftituted, but dies before induction; the former fhall not keep his new benefice, becaufe the exchange was not completed, and therefore he fhall return back to his own [e]. For if, after an exchange of lands or other hereditaments, either party be evicted of thofe which were taken by him in exchange, through defect of the other's title; he fhall return back to the poffeffion of his own, by virtue of the implied warranty contained in all exchanges [f].

6. A PARTITION, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the

y For the other learning relating to leafes, which is very curious and diffufive, I muft refer the ftudent to 3 Bac. abridg. 295. (title, *leafes and terms for years*) where the fubject is treated in a perfpicuous and mafterly manner; being fuppofed to be extracted from a manufcript of fir Geoffrey Gilbert.

z Co. Litt. 50, 51.

a Litt. §. 64, 65.

b Co. Litt. 51.

c Litt. §. 62.

d Co. Litt. 50.

e Perk. §. 288.

f pag. 300.

lands so held among them in severalty, each taking a distinct part. Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin [g]. And the statutes of 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds 29 Car. II. c. 3. hath now abolished this distinction, and made a deed in all cases necessary.

THESE are the several species of *primary*, or *original* conveyances. Those which remain are of the *secondary*, or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. RELEASES; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and for ever quit-claimed [h]:" And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee [i]. But in this case the releasee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releasee [k]. 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her

g Litt. §. 250. Co. Litt. 169.
h Litt. §. 445.
i *Ibid.* §. 465.
k *Ibid.* §. 459.

right

right to the other, this passeth the fee-simple of the whole [l]. And in both these cases there must be a privity of estate between the releffor and releffee [m]; that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful [n]. 4. By way of *extinguishment*: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate [o]. 5. By way of *entry and feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee [p]. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the releffee is a matter of sufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a release. Sir Edward Coke defines it [q] to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased: and the words of making it are these, "have given, "granted, ratified, approved, and confirmed [r]." An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he

l Co. Litt. 273.
m *Ibid.* 272, 273.
n Litt. §. 466.
o *Ibid.* §. 470.
p Co. Litt. 278.
q 1 Inst. 295.
r Litt. §. 515. 531.

hath confirmed the eſtate of the leſſee for years, before the death of tenant for life, it is no longer voidable but ſure [s]. The latter branch, or that which tends to the increaſe of a particular eſtate, is the ſame in all reſpects with that ſpecies of releaſe, which operates by way of enlargement.

9. A SURRENDER, *ſurſumredditio*, or rendering up, is of a nature directly oppoſite to a releaſe; for, as that operates by the greater eſtate's deſcending upon the leſs, a ſurrender is the falling of a leſs eſtate into a greater. It is defined [t], a yielding up of an eſtate for life or years to him that hath the immediate reverſion or remainder, wherein the particular eſtate may merge or drown, by mutual agreement between them. It is done by theſe words, "hath ſurrendered, granted, and "yielded up." The ſurrenderor muſt be in poſſeſſion [u]; and the ſurrenderee muſt have a higher eſtate, in which the eſtate ſurrendered may merge: therefore tenant for life cannot ſurrender to him in remainder for years [w]. In a ſurrender there is no occaſion for livery of ſeiſin [x]; for there is a privity of eſtate between the ſurrenderor, and the ſurrenderee; the one's particular eſtate, and the other's remainder are one and the ſame eſtate; and livery having been once made at the creation of it, there is no neceſſity for having it afterwards. And, for the ſame reaſon, no livery is required on a releaſe or confirmation in fee to tenant for years or at will, though a freehold thereby paſſes: ſince the reverſion of the releſſor, or confirmor, and the particular eſtate of the releſſee, or confirmee, are one and the ſame eſtate; and where there is already a poſſeſſion, derived from ſuch a privity of eſtate, any farther delivery of poſſeſſion would be vain and nugatory [y].

10. AN *aſſignment* is properly a transfer, or making over to another, of the right one has in *any* eſtate; but it is uſually applied to an eſtate for life or years. And it differs from a leaſe only in this: that by a leaſe one grants an intereſt leſs

[s] Litt. §. 516.
[t] Co. Litt. 337.
[u] *Ibid.* 338.
[w] Perk. §. 589.
[x] Co. Litt. 50.
[y] Litt. §. 460.

than

than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.

11. A DEFEAZANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*[z] or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law[a]; and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like) were always liable to be recalled by defeazances made subsequent to the time of their creation[b].

II. THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

USES and *trusts* are in their original of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* than the *usus-fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance[c]. But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he

z From the French verb *defaire*, *infectum reddere*.

a Co. Litt. 236.

b *Ibid.* 237.

c *Ff.* 7. 1. 1.

ſhould convey it or diſpoſe of the profits at the will of another. And it was the buſineſs of a particular magiſtrate, the *praetor fidei commiſſarius*, inſtituted by Auguſtus, to enforce the obſervance of this confidence [d]. So that the right thereby given was looked upon as a veſted right, and entitled to a remedy from a court of juſtice: which occaſioned that known diviſion of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary courſe of law; *jus fiduciarium*, a right in truſt, for which there was a remedy in conſcience; and *jus precarium*, a right in courteſy, for which the remedy was only by intreaty or requeſt [e]. In our law, a uſe might be ranked under the rights of the ſecond kind; being a confidence repoſed in another who was tenant of the land, or *terre-tenant*, that he ſhould diſpoſe of the land according to the intentions of *ceſtuy que uſe*, or him to whoſe uſe it was granted, and ſuffer him to take the profits [f]. As, if a feoffment was made to A and his heirs, to the uſe of (or in truſt for) B and his heirs; here at the common law A the *terre-tenant*, had the legal property and poſſeſſion of the land, but B the *ceſtuy que uſe* was in conſcience and equity to have the profits and diſpoſal of it.

THIS notion was tranſplanted into England from the civil law, about the cloſe of the reign of Edward III [g], by means of the foreign eccleſiaſtics; who introduced it to evade the ſtatutes of mortmain, by obtaining grants of lands, not to their religious houſes directly, but to *the uſe of* the religious houſes [h]: which the clerical chancellors of thoſe times held to be *fidei-commiſſa*, and binding in conſcience; and therefore aſſumed the juriſdiction, which Auguſtus had veſted in his *praetor*, of compelling the execution of ſuch truſts in the court of chancery. And, as it was moſt eaſy to obtain ſuch grants from dying perſons, a maxim was eſtabliſhed, that though by law the lands themſelves were not deviſable, yet if a teſtator had enfeoffed another to his own uſe, and ſo was

[d] *Inſt.* 2. *tit.* 23.

[e] *Ff.* 43. 26. 1. Bacon on uſes. 8o. 306.

[f] Plowd. 352.

[g] Stat. 50 Edw. III. c. 6. 1 Rich. II. c. 9. 1 Rep. 139.

[h] See pag. 271.

poſſeſſed

possessed of the use only, such use was devisable by will. But we have seen [i] how this evasion was crushed in it's infancy, by statute 15 Ric. II. c. 5. with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal: through the desire that men had (when their lives were continually in hazard) of providing for their children by will; and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Edward IV, (before whose time, lord Bacon remarks [k], there are not six cases to be found relating to the doctrine of uses) the courts of equity began to reduce them to something of a regular system.

ORIGINALLY it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI, with respect to the heir [l]; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use [m]. But a purchasor for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king or queen, on account of their dignity royal [n], nor any corporation aggre-

[i] page 272.

[k] on uses. 313.

[l] Keilw. 42. Yearbook. 22 Edw. IV. 6.

[m] Keilw. 46. Bacon of uses. 312.

[n] Bro. *Abr. tit. Feoffm. al uses.* 31. Bacon of uses. 346, 347.

gate, on account of it's limited capacity [o], could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use [p]; because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

ON the other hand the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quae ipso usu consumuntur* [q]: or whereof the seisin could not be instantly given [r]. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself [s]: unless he expresly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions [t]. But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration [u]. 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession [w]; for in this and many other respects *aequitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties [x], or be devised by last will and testament [y]: for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary;

o Bro. *Abr. tit. Feoffm. al uses.* 40. Bacon. 347.
p 1 Rep. 122.
q 1 Jon. 127.
r Cro. Eliz. 401.
s See page 296.
t 1 And. 37.
u Moor. 684.
w 2 Roll. Abr. 780.
x Bacon of uses. 312.
y *Ibid.* 308.

and,

and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene the legal interest of the lands, without the concurrence of his feoffee [z]; to whom he was accounted by law to be only tenant at sufferance [a]. 5. Uses were not liable to any of the feodal burthens; and particularly did not escheat for felony or other defect of blood; for escheats, *&c.* are the consequence of *tenure*, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use [b]. 6. No wife could be endowed, or husband have his curtesy, of a use [c]: for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures [d]. 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use* [e]. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

IT is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties, which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outlines will be fully sufficient to shew the ground of lord Bacon's complaint [f], that this course of proceeding "was turned to "deceive many of their just and reasonable rights. A man, "that had cause to sue for land, knew not against whom to

z Stat. 1 Ric. III. c. 1.
a Bro. *Abr. ibid.* 23.
b Jenk. 190.
c 4 Rep. 1. 2 And. 75.
d See page 137.
e Bro. *Abr. tit. executions.* 90.
f Use of the law. 153.

"bring

"bring his action, or who was the owner of it. The wife was "defrauded of her thirds; the husband of his curtesy; the lord "of his wardship, relief, heriot, and escheat; the creditor "of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use*[g], allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits[h]; made him liable to actions of waste[i]; established his conveyances and leases made without the concurrence of his feoffees[k]; and gave the lord the wardship of his heir, with certain other feodal perquisites[l].

THESE provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10. which is usually called the *statute of uses*, or, in conveyances and pleadings, the statute *for transferring uses into possession*. The hint seems to have been derived from what was done at the accession of king Richard III; who having, when duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed[m], which ordained, that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the statute of Henry VIII. after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be *seised* of lands, &c. "to the use, confidence, or trust, of any other person or body

[g] Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2, 3. 19 Hen. VII. c. 15.

[h] Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7. c. 15. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.

[i] Stat. 11 Hen. VI. c. 5.

[k] Stat. 1 Ric. III. c. 1.

[l] Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.

[m] 1 Ric. III. c. 5.

"politic, the person or corporation entitled to the use in fee-"simple, fee-tail, for life, or years, or otherwise, shall from "thenceforth stand and be seised or possessed of the land, *&c.* "of and in the like estates as they have in the use, trust, or "confidence; and that the estate of the person so seised to "uses shall be deemed to be in him or them that have the "use, in such quality, manner, form, and condition, as they "had before in the use." The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession: thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

THE statute having thus, not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in it's fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchasor discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy que use*, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

THE

THE various neceſſities of mankind induced alſo the judges very ſoon to depart from the rigour and ſimplicity of the rules of the common law, and to allow a more minute and complex conſtruction upon conveyances to uſes than upon others. Hence it was adjudged, that the uſe need not always be executed the inſtant the conveyance is made: but, if it cannot take effect at that time, the operation of the ſtatute may wait till the uſe ſhall ariſe upon ſome future contingency, to happen within a reaſonable period of time; and in the mean while the antient uſe ſhall remain in the original grantor: as, when lands are conveyed to the uſe of A and B, after a marriage ſhall be had between them [n], or to the uſe of A and his heirs till B ſhall pay him a ſum of money, and then to the uſe of B and his heirs [o]. Which doctrine, when deviſes by will were again introduced, and conſidered as equivalent in point of conſtruction to declarations of uſes, was alſo adopted in favour of *executory deviſes* [p]. But herein theſe, which are called *contingent* or *ſpringing* uſes, differ from an executory deviſe; in that there muſt be a perſon ſeiſed to ſuch uſes at the time when the contingency happens, elſe they can never be executed by the ſtatute; and therefore if the eſtate of the feoffee to ſuch uſe be deſtroyed by alienation or otherwiſe, before the contingency ariſes, the uſe is deſtroyed for ever [q]: whereas by an executory deviſe the freehold itſelf is transferred to the future deviſee. And, in both theſe caſes, a fee may be limited to take effect after a fee [r]; becauſe, though that was forbidden by the common law in favour of the lord's eſcheat, yet when the legal eſtate was not extended beyond one fee-ſimple, ſuch ſubſequent uſes (after a uſe in fee) were before the ſtatute permitted to be limited in equity; and then the ſtatute executed the legal eſtate in the ſame manner as the uſe before ſubſiſted. It was alſo held that a uſe, though executed, may change from one to another by circumſtances *ex poſt facto* [s]; as, if A makes a feoffment

[n] 2 Roll. Abr. 791. Cro. Eliz. 439.
[o] Bro. *Abr. tit. Feoffm. al uſes.* 30.
[p] See page 173.
[q] 1 Rep. 134. 138. Cro. Eliz. 439.
[r] Pollexf. 78. 10 Mod. 423.
[s] Bro. *Abr. tit. Feoffm. al uſes.* 30.

to

to the uſe of his intended wife and her eldeſt ſon for their lives, upon the marriage the wife takes the whole uſe in ſeveralty; and, upon the birth of a ſon, the uſe is executed jointly in them both [t]. This is ſometimes called a *ſecondary*, ſometimes a *ſhifting*, uſe. And, whenever the uſe limited by the deed expires, or cannot veſt, it returns back to him who raiſed it, after ſuch expiration or during ſuch impoſſibility, and is ſtiled a *reſulting* uſe. As, if a man makes a feoffment to the uſe of his intended wife for life, with remainder to the uſe of her firſt-born ſon in tail: here, till he marries, the uſe reſults back to himſelf; after marriage, it is executed in the wife for life; and, if ſhe dies without iſſue, the whole reſults back to him in fee [u]. It was likewiſe held, that the uſes originally declared may be revoked at any future time, and new uſes be declared of the land, provided the grantor reſerved to himſelf ſuch a power at the creation of the eſtate; whereas the utmoſt that the common law would allow, was a deed of defeazance coeval with the grant itſelf (and therefore eſteemed a part of it) upon events ſpecifically mentioned [w]. And, in caſe of ſuch a revocation, the old uſes were held inſtantly to ceaſe, and the new ones to become executed in their ſtead [x]. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon obſerves [y]) have always affected to have the diſpoſition of their property revocable in their own time, and irrevocable ever afterwards.

By this equitable train of deciſions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminiſhed. But one or two technical ſcruples, which the judges found it hard to get over, reſtored it with tenfold increaſe. They held, in the firſt place, that "no uſe could be limited on a uſe [z]," and that when a man bargains and ſells his land for money, which raiſes a uſe by implication to the bargainee, the limitation of a farther uſe to another perſon is repugnant, and therefore

t Bacon of uſes. 351.
u *Ibid.* 350. 1 Rep. 120.
w See page 327.
x Co. Litt. 237.
y on uſes. 316.
z Dyer. 155.

void [a]. And therefore, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last *cestuy que use*. Again; as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed* [b]; and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not execute this use, but leaves it as at common law [c]. And lastly, (by more modern resolutions) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust [d].

OF the two more antient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B was never intended by the parties to have any beneficial interest; and, in the second, the *cestuy que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that though these were not *uses*, which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed [e]. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*: and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance [f].

[a] 1 And. 37. 136.
[b] Bacon law of uses. 335. Jenk. 244.
[c] Poph. 76. Dyer. 369.
[d] 1 Equ. Cas. Ab. 383, 384.
[e] 1 Hal. P. C. 248.
[f] Vaugh. 50. Atk. 591.

How-

HOWEVER, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3. having required that every declaration, assignment, or grant of any trust in lands or hereditaments, (except such as arise from implication or construction of law) shall be made in writing signed by the party, or by his written will; the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchasor without notice [g]; which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances, (by the express provision of the statute of frauds) to forfeiture, to leases and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents [h], than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs [i]: because the trust could never be intended for his benefit. But let us now return to the statute of uses.

THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to

g 2 Freem. 43.

h 1 Chanc. Rep. 254. 2 P. Wms. 640.

i Hadr. 494. Burgess and Wheat, Hil. 32 Geo. II. in Canc.

ſave the trouble of making livery of ſeiſin, the only antient conveyance of corporeal freeholds: the ſecurity and notoriety of which public inveſtiture abundantly overpaid the labour of going to the land, or of ſending an attorney in one's ſtead. But this now has given way to

12. A TWELFTH ſpecies of conveyance, called a *covenant to ſtand ſeiſed to uſes*: by which a man, ſeiſed of lands, covenants in conſideration of blood or marriage that he will ſtand ſeiſed of the ſame to the uſe of his child, wife, or kinſman; for life, in tail, or in fee. Here the ſtatute executes at once the eſtate; for the party intended to be benefited, having thus acquired the uſe, is thereby put at once into corporal poſſeſſion of the land [k], without ever ſeeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon ſuch weighty and intereſting conſiderations as thoſe of blood or marriage.

13. A THIRTEENTH ſpecies of conveyance, introduced by this ſtatute, is that of a *bargain and ſale* of lands; which is a kind of a real contract, whereby the bargainor for ſome pecuniary conſideration bargains and ſells, that is, contracts to convey, the land to the bargainee; and becomes by ſuch a bargain a truſtee for, or ſeiſed to the uſe of, the bargainee; and then the ſtatute of uſes completes the purchaſe [l]: or, as it hath been well expreſſed [m], the bargain firſt veſts the uſe, and then the ſtatute veſts the poſſeſſion. But as it was foreſeen that conveyances, thus made, would want all thoſe benefits of notoriety, which the old common law aſſurances were calculated to give; to prevent therefore clandeſtine conveyances of freeholds, it was enacted in the ſame ſeſſion of parliament by ſtatute 27 Hen. VIII. c. 16. that ſuch bargains and ſales ſhould not enure to paſs a freehold, unleſs the ſame be made by indenture, and *enrolled* within ſix months in one of the courts of Weſtminſter-hall or with the *cuſtos rotulorum* of the county. Clandeſtine bargains and ſales of chattel intereſts, or leaſes for years, were thought not worth regarding, as ſuch intereſts were very precarious till about ſix years before [n]; which alſo occaſioned them to be overlooked in fram-

k Bacon. Uſe of the law. 151.

l *Ibid.* 150.

m Cro. Jac. 696.

n See pag. 142.

ing the ſtatute of uſes: and therefore ſuch bargains and ſales are not directed to be enrolled. But how impoſſible it is to foreſee, and provide againſt, *all* the conſequences of innovations! This omiſſion has given riſe to

14. A FOURTEENTH ſpecies of conveyance, *viz.* by *leaſe and releaſe*; firſt invented by ſerjeant Moore, ſoon after the ſtatute of uſes, and now the moſt common of any, and therefore not to be ſhaken; though very great lawyers (as, particularly, Mr. Noy, attorney-general to Charles I.) have formerly doubted it's validity [o]. It is thus contrived. A leaſe, or rather bargain and ſale, upon ſome pecuniary conſideration, for one year, is made by the tenant of the freehold to the leſſee or bargainee. Now this, without any enrollment, makes the bargainor ſtand ſeiſed to the uſe of the bargainee, and veſts in the bargainee the *uſe* of the term for a year; and then the ſtatute immediately annexes the *poſſeſſion*. He therefore being thus in poſſeſſion, is capable of receiving a releaſe of the freehold and reverſion; which we have ſeen before [p], muſt be made to a tenant in poſſeſſion: and, accordingly, the next day, a releaſe is granted to him [q]. This is held to ſupply the place of livery of ſeiſin: and ſo a conveyance by leaſe and releaſe is ſaid to amount to a feoffment [r].

15. To theſe may be added deeds to *lead* or *declare the uſes* of other more direct conveyances, as feoffments, fines, and recoveries; of which we ſhall ſpeak in the next chapter: and,

16. DEEDS of *revocation of uſes*; hinted at in a former page [s], and founded in a previous power, reſerved at the raiſing of the uſes [t], to revoke ſuch as were then declared; and to appoint others in their ſtead, which is incident to the power of revocation [u]. And this may ſuffice for a ſpecimen of conveyances founded upon the ſtatute of uſes; and will finiſh our obſervations upon ſuch deeds as ſerve to *transfer* real property.

o 2 Mod. 252.
p pag. 324.
q See appendix. No. II. §. 1, 2.
r Co. Litt. 270. Cro. Jac. 604.
s pag. 335.
t See appendix. No. II. pag. xi.
u Co. Litt. 237.

BEFORE we conclude, it will not be improper to ſubjoin a few remarks upon ſuch deeds as are uſed not to *convey*, but to *charge* or incumber, lands, and to *diſcharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. AN *obligation* or bond, is a deed[v] whereby the obligor obliges himſelf, his heirs, executors, and adminiſtrators, to pay a certain ſum of money to another at a day appointed. If this be all, the bond is called a ſingle one, *ſimplex obligatio*: but there is generally a condition added, that if the obligor does ſome particular act, the obligation ſhall be void, or elſe ſhall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal ſum of money borrowed of the obligee, with intereſt, which principal ſum is uſually one half of the penal ſum ſpecified in the bond. In caſe this condition is not performed, the bond becomes forfeited, or abſolute at law, and charges the obligor while living; and after his death the obligation deſcends upon his heir, who (on defect of perſonal aſſets) is bound to diſcharge it, provided he has real aſſets by deſcent as a recompenſe. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. How it affects the perſonal property of the obligor, will be more properly conſidered hereafter.

IF the condition of a bond be impoſſible at the time of making it, or be to do a thing contrary to ſome rule of law that is merely poſitive, or be uncertain, or inſenſible, the condition alone is void, and the bond ſhall ſtand ſingle, and unconditional: for it is the folly of the obligor to enter into ſuch an obligation, from which he can never be releaſed. If it be to do a thing that is *malum in ſe*, the obligation itſelf is void: for the whole is an unlawful contract, and the obligee ſhall take no advantage from ſuch a tranſaction. And if the condition be poſſible at the time of making it, and afterwards

[v] See appendix. N°. III. pag. xiii.

becomes

becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency [w]. On the forfeiture of a bond, or it's becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the like practice having gained some footing in the courts of law [x], the statute 4 & 5 Ann. c. 16. at length enacted, in the same spirit of equity, that, in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized [y], with condition to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowlegement of a former debt upon record; the form whereof is, "that A. B. doth acknowlege to owe to our lord the king, to "the plaintiff, to C. D. or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff C. D. *&c.* is called the cognizee, "*is cui cognoscitur;*" as he that enters into the recognizance is called the cognizor, "*is qui cognoscit.*" This, being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict propriety a deed, though the effects of it are greater than a

[w] Co. Litt. 206.

[x] 2 Keb. 553. 555. Salk. 596, 597. 6 Mod. 11. 60. 101.

[y] Bro. *Abr. tit. recognizance.* 24.

common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record[z]. There are alſo other recognizances, of a private kind, *in nature of a ſtatute ſtaple*, by virtue of the ſtatute 23 Hen. VIII. c. 6. which have been already explained[a], and ſhewn to be a charge upon real property.

3. A DEFEAZANCE, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the ſame manner as a defeazance of an eſtate before-mentioned. It differs only from the common condition of a bond, in that the one is always inſerted in the deed or bond itſelf, the other is made between the ſame parties by a ſeparate, and frequently a ſubſequent deed[b]. This, like the condition of a bond, when performed, diſcharges and diſincumbers the eſtate of the obligor.

THESE are the principal ſpecies of deeds or matter *in pais*, by which eſtates may be either conveyed, or at leaſt affected. Among which the conveyances to uſes are by much the moſt frequent of any; though in theſe there is certainly one palpable defect, the want of ſufficient notoriety: ſo that purchaſors or creditors cannot know with any abſolute certainty, what the eſtate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the antient feodal method of conveyance (by giving corporal ſeiſin of the lands) this notoriety was in ſome meaſure anſwered; but all the advantages reſulting from thence are now totally defeated by the introduction of death-bed deviſes and ſecret conveyances: and there has never been yet any ſufficient guard provided againſt fraudulent charges and incumbrances; ſince the diſuſe of the old Saxon cuſtom of tranſacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of ſome adjacent monaſtery[c]; and the failure of the general regiſter eſtabliſhed by king Richard the firſt, for the ſtarrs or mortgages made to

z Stat. 29 Car. II. c. 3. See pag. 161.

a See pag. 160.

b Co. Litt. 237. 2 Sand. 47.

c Hickes *Diſſertat. epiſtolar.* 9.

Jews,

Jews, in the *capitula de Judaeis*, of which Hoveden has preserved a copy. How far the eſtabliſhment of a like general regiſter, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deſerves to be well conſidered. In Scotland every act and event, regarding the tranſmiſſion of property, is regularly entered on record [d]. And ſome of our own provincial diviſions, particularly the extended county of York, and the populous county of Middleſex, have prevailed with the legiſlature [e] to erect ſuch regiſters in their ſeveral diſtricts. But, however plauſible theſe proviſions may appear in theory, it hath been doubted by very competent judges, whether more diſputes have not ariſen in thoſe counties by the inattention and omiſſions of parties, than prevented by the uſe of regiſters.

[d] Dalrymple on feodal property. 262, &c.

[e] Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

CHAPTER THE TWENTY-FIRST.

OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are ſuch as do not entirely depend on the act or conſent of the parties themſelves: but the ſanction of a court of record is called in to ſubſtantiate, preſerve, and be a perpetual teſtimony of the transfer of property from one man to another; or of it's eſtabliſhment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE *acts of parliament* are, eſpecially of late years, become a very common mode of aſſurance. For it may ſometimes happen, that by the ingenuity of ſome, and the blunders of other practitioners, an eſtate is moſt grievouſly entangled by a multitude of contingent remainders, reſulting truſts, ſpringing uſes, executory deviſes, and the like artificial contrivances; (a confuſion unknown to the ſimple conveyances of the common law) ſo that it is out of the power of either the courts of law or equity to relieve the owner. Or, it may ſometimes happen, that by the ſtrictneſs or omiſſions of family ſettlements, the tenant of the eſtate is abridged of ſome reaſonable power, (as letting leaſes, making a jointure for a wife, or the like) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be neceſſary, in ſettling an eſtate, to ſecure it againſt the claims of infants or other perſons under legal diſabilities; who are not bound by any judgements or decrees of the ordinary courts of juſtice. In theſe, or other caſes of

the like kind, the tranſcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpoſe, to unfetter an eſtate; to give it's tenant reaſonable powers; or to aſſure it to a purchaſor, againſt the remote or latent claims of infants or diſabled perſons, by ſettling a proper equivalent in proportion to the intereſt ſo barred. This practice was carried to a great length in the year ſucceeding the reſtoration; by ſetting aſide many conveyances alleged to have been made by conſtraint, or in order to ſcreen the eſtates from being forfeited during the uſurpation. And at laſt it proceeded ſo far, that, as the noble hiſtorian expreſſes it [a], every man had raiſed an equity in his own imagination, that he thought was intitled to prevail againſt any deſcent, teſtament, or act of law, and to find relief in parliament: which occaſioned the king at the cloſe of the ſeſſion to remark [b], that the good old rules of law are the beſt ſecurity; and to wiſh, that men might not have too much cauſe to fear, that the ſettlements which they make of their eſtates ſhall be too eaſily unſettled when they are dead, by the power of parliament.

ACTS of this kind are however at preſent carried on, in both houſes, with great deliberation and caution; particularly in the houſe of lords they are uſually referred to two judges to examine and report the facts alleged, and to ſettle all technical forms. Nothing alſo is done without the conſent, expreſsly given, of all parties in being and capable of conſent, that have the remoteſt intereſt in the matter; unleſs ſuch conſent ſhall appear to be perverſely and without any reaſon withheld. And, as was before hinted, an equivalent in money or other eſtate is uſually ſettled upon infants, or perſons not *in eſſe*, or not of capacity to act for themſelves, who are to be concluded by this act. And a general ſaving is conſtantly added, at the cloſe of the bill, of the right and intereſt of all perſons whatſoever; except thoſe whoſe conſent is ſo given or purchaſed, and who are therein particularly named: though it hath been holden, that, even if ſuch ſaving be omitted, the act ſhall bind none but the parties [c].

[a] Lord Clar. Contin. 162. [b] *Ibid.* 163. [c] Co. 138. Godb. 171.

A LAW,

A LAW, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *publick*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions [c]; it hath been holden to be void, if contrary to law and reason [d]; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE *king's grants* are also matter of public record. For, as St. Germyn says [e], the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literae clausae*; and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

GRANTS or letters patent must first pass by *bill*: which is prepared by the attorney and solicitor general, in consequence

c Richardson v. Hamilton. *Canc.* 8 Jan. 1773. McKenzie v. Stuart. *Dom. Proc.* 13 Mar. 1754.

d 4 Rep. 12.

e Dr & Stud. b. 1. d. 8.

of

of a warrant from the crown; and is then signed, that is, subscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself[d]." Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal[e]." But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy* seal.

THE *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against the grantor*. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis*; and then they have a more liberal construction[f]. 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted[g]: and if a feoffment of land was made by a lord to his villein, this operated as a manumission[h]; for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for

[d] 9 Rep. 18.
[e] *Ibid.* 2 Inst. 555.
[f] Finch. L. 100. 10 Rep. 112.
[g] Co. Litt. 56.
[h] Litt. §. 206.

ſuch grant ſhall not alſo enure to make him a denizen, that ſo he may be capable of taking by grant [i]. 3. When it appears, from the face of the grant, that the king is miſtaken, or deceived, either in matter of fact or matter of law, as in caſe of falſe ſuggeſtion, miſinformation, or miſrecital of former grants; or if his own title to the thing granted be different from what he ſuppoſes; or if the grant be informal; or if he grants an eſtate contrary to the rules of law; in any of theſe caſes the grant is abſolutely void [k]. For inſtance; if the king grants lands to one and his *heirs male*, this is merely void: for it ſhall not be an eſtate-tail, becauſe there want words of procreation, to aſcertain the body, out of which the heirs ſhall iſſue: neither is it a fee-ſimple, as in common grants it would be; becauſe it may reaſonably be ſuppoſed, that the king meant to give no more than an eſtate-tail [l]: the grantee is therefore (if any thing) nothing more than tenant at will [m]. And, to prevent deceits of the king, with regard to the value of the eſtate granted, it is particularly provided by the ſtatute 1 Hen. IV. c. 6. that no grant of his ſhall be good, unleſs, in the grantee's petition for them, expreſs mention be made of the real value of the lands.

III. WE are next to conſider a very uſual ſpecies of aſſurance, which is alſo of record; *viz.* a *fine* of lands and tenements. In which it will be neceſſary to explain, 1. The *nature* of a fine; 2. It's ſeveral *kinds*; and 3. It's *force* and *effect*.

1. A FINE is ſometimes ſaid to be a feoffment of record [n]: though it might with more accuracy be called, an acknowlegement of a feoffment on record. By which is to be underſtood, that it has at leaſt the ſame force and effect with a feoffment, in the conveying and aſſuring of lands: though it is one of thoſe methods of transferring eſtates of freehold by the common law, in which livery of ſeiſin is not neceſſary

i Bro. *Abr. tit. Patent.* 62. Finch. *L.* 110.

k Freem. 172.

l Finch. 101, 102.

m Bro. *Abr. tit. Eſtates.* 34. *tit Patents.* 104. Dyer. 270. Dav. 45.

n Co. Litt. 50.

to

to be actually given; the supposition and acknowlegement thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowleged to be, the right of one of the parties [o]. In it's original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A FINE is so called because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an antient record of parliament [p], 18 Edw. I. "*non in regno* "*Angliae providetur, vel est, aliqua securitas major vel solennior,* "*per quam aliquis statum certiorem habere possit, neque ad statum* "*suum verificandum aliquod solennius testimonium producere,* "*quam finem in curia domini regis levatum: qui quidem finis sic* "*vocatur, eo quod finis et consummatio omnium placitorum esse* "*debet, et hac de causa providebatur.*" Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil [q] and Bracton [r] in the reigns of Henry II, and Henry III, as things then well known and long established; and instances have been produced of them even prior to the Norman invasion [s]. So that the statute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied, or carried on. And that is as follows:

1. THE party, to whom the land is to be conveyed or assured, commences an action or suit at law against the other,

o Co. Litt. 120.

p 2 Roll. Abr. 13.

q *l.* 8. *c.* 1.

r *l.* 5. *t.* 5. *c.* 28.

s Plowd. 369.

generally

generally an action of covenant [t], by suing out a writ of *praecipe*, called a writ of covenant [v]: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value [u]. The suit being thus commenced, then follows,

2. THE *licentia concordandi*, or leave to agree the suit [w]. For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value [x].

3. NEXT comes the *concord*, or agreement itself [y], after leave obtained from the court; which is usually an acknowlegement from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowlegement, or recognition of right, the party levying the fine is called the

t A fine may also be levied on a writ of *mesne*, of *warrantia chartae*, or *de consuetudinibus et servitiis*. (Finch. L. 278.)

v See appendix. No. IV. §. 1.

u 2 Inst. 511.

w Append. No. IV. §. II. In the times of strict feodal jurisdiction, if a vasal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson. Cha. V. i. 31.)

x 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.

y Append. No. IV. §. 3.

cognizor, and he to whom it is levied the *cognizee*. This acknowlegement muſt be made either openly in the court of common pleas, or before the lord chief juſtice of that court; or elſe before one of the judges of that court, or two or more commiſſioners in the country, empowered by a ſpecial authority called a writ of *dedimus poteſtatem*; which judges and commiſſioners are bound by ſtatute 18 Edw. I. ſt. 4. to take care that the cognizors be of full age, ſound memory, and out of priſon. If there be any feme-covert among the cognizors, ſhe is privately examined whether ſhe does it willingly and freely, or by compulſion of her huſband.

BY theſe acts all the eſſential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowleged, provided it be ſubſequent to the day on which the writ is made returnable [z], ſtill the fine ſhall be carried on in all it's remaining parts: of which the next is

4. THE *note* of the fine [a]: which is only an abſtract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This muſt be enrolled of record in the proper office, by direction of the ſtatute 5 Hen. IV. c. 14.

5. THE fifth part is the *foot* of the fine, or concluſion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowleged or levied [b]. Of this there are indentures made, or engroſſed, at the chirographer's office, and delivered to the cognizor and the cognizee; uſually beginning thus, "*haec eſt finalis* "*concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

BY ſeveral ſtatutes ſtill more ſolemnities are ſuperadded, in order to render the fine more univerſally public, and leſs liable to be levied by fraud or covin. And, firſt, by 27 Edw. I.

[z] Comb. 71.
[a] Append. N°. IV. §. 4.
[b] *Ibid.* §. 5.

c. 1. the note of the fine ſhall be openly read in the court of common pleas, at two ſeveral days in one week, and during ſuch reading all pleas ſhall ceaſe. By 5 Hen. IV. c. 14. and 23 Eliz. c. 3. all the proceedings on fines, either at the time of acknowlegement, or previous, or ſubſequent thereto, ſhall be enrolled of record in the court of common pleas. By 1 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24. the fine, after engroſſment, ſhall be openly read and proclaimed in court (during which all pleas ſhall ceaſe) ſixteen times; *viz.* four times in the term in which it is made, and four times in each of the three ſucceeding terms; which is reduced to once in each term by 31 Eliz. c. 2. and theſe proclamations are indorſed on the back of the record [c]. It is alſo enacted by 23 Eliz. c. 3. that the chirographer of fines ſhall every term write out a table of the fines levied in each county in that term, and ſhall affix them in ſome open part of the court of common pleas all the next term: and ſhall alſo deliver the contents of ſuch table to the ſheriff of every county, who ſhall at the next aſſiſes fix the ſame in ſome open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine "*ſur cognizance de droit, come* "*ceo que il ad de ſon done;*" or, a fine upon acknowlegement of the right of the cognizee, as that which he hath of the gift of the cognizor [d]. This is the beſt and ſureſt kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in queſtion, and at the ſame time to avoid the formality of an actual feoffment and livery, acknowleges in court a former feoffment, or gift in poſſeſſion, to have been made by him to the plaintiff. This fine is therefore ſaid to be a feoffment of record; the livery, thus acknowleged in court, being equivalent to an actual livery: ſo that this aſſurance is rather a confeſſion of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowleges,

c Appendix. N°. IV. §. 6.

d This is that ſort, of which an example is given in the appendix, N°. IV.

cognoſcit,

cognoscit, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or, upon acknowlegement of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person [e]. It is worded in this manner; "that the cognizor acknowleges "the right to be in the cognizee; and grants for himself and "his heirs, that the reversion, after the particular estate de-"termines, shall go to the cognizee [f]." 3. A fine "*sur conces-*"*sit*" is where the cognizor, in order to make an end of disputes, though he acknowleges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant [g]. 4. A fine, "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit cum ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold [h]. In this last species of fine, the cognizee, after the right is acknowleged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. WE are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24. and 32 Hen. VIII. c. 36. The antient common law, with respect to this point,

e Moor. 629.
f West. Symb. p. 2. §. 95.
g West. p. 2. §. 66.
h Salk. 340.

is very forcibly declared by the ſtatute 18 Edw. I. in theſe words. "And the reaſon, why ſuch ſolemnity is required "in the paſſing of a fine, is this; becauſe the fine is ſo high "a bar, and of ſo great force, and of a nature ſo powerful "in itſelf, that it precludes not only thoſe which are parties "and privies to the fine, and their heirs, but all other per"ſons in the world, who are of full age, out of priſon, of "ſound memory, and within the four ſeas, the day of the "fine levied; unleſs they put in their claim on the foot[h] of "the fine within a year and a day." But this doctrine, of barring the right by *non-claim*, was aboliſhed for a time by a ſtatute made in 34 Edw. III. c. 16. which admitted perſons to claim, and falſify a fine, at any indefinite diſtance[i]: whereby, as ſir Edward Coke obſerves[k], great contention aroſe, and few men were ſure of their poſſeſſions, till the parliament held 4 Hen. VII. reformed that miſchief, and excellently moderated between the latitude given by the ſtatute and the rigour of the common law. For the ſtatute, then made[l], reſtored the doctrine of non-claim; but extended the time of claim. So that now, by that ſtatute, the right of all ſtrangers whatſoever is bound, unleſs they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme-coverts, infants, priſoners, perſons beyond the ſeas, and ſuch as are not of whole mind; who have five years allowed to them and their heirs, after the death of their huſbands, their attaining full age, recovering their liberty, returning into England, or being reſtored to their right mind.

IT ſeems to have been the intention of that politic prince, king Henry VII, to have covertly by this ſtatute extended fines to have been a bar of eſtates tail, in order to unfetter the more eaſily the eſtates of his powerful nobility, and lay

h *Sur la pie* as it is in the Cotton MS. and not *par le pais* as printed by Berthelet and in 2 Inſt. 511. There were then four methods of claiming, ſo as to avoid being concluded by a fine: 1. By action. 2. By entring ſuch claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim. 2 Inſt. 518. The ſecond is not now in force under the ſtatute of Henry VII.

i Litt. §. 441.

k 2 Inſt. 518.

l 4 Hen. VII. c. 24. See page 118.

 them

them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, (which they were expresly declared *not* to be by the statute *de donis*) the statute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure[m]; or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

FROM this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*.

THE *parties* are either the cognizors, or cognizees; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate.

PRIVIES to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act

m See statute 11 Hen. VII. c. 20.

of the principal his ſubſtitute, or ſuch as claim under any conveyance made by him ſubſequent to the fine ſo levied [n].

STRANGERS to a fine are all other perſons in the world, except only parties and privies. And theſe are alſo bound by a fine, unleſs, within five years after proclamations made, they interpoſe their claim; provided they are under no legal impediments, and have then a preſent intereſt in the eſtate. The impediments, as hath before been ſaid, are coverture, infancy, impriſonment, inſanity, and abſence beyond ſea: and perſons, who are thus incapacitated to proſecute their rights, have five years allowed them to put in their claims after ſuch impediments are removed. Perſons alſo that have not a preſent, but a future intereſt only, as thoſe in remainder or reverſion, have five years allowed them to claim in, from the time that ſuch right accrues [o]. And if within that time they neglect to claim, or (by the ſtatute 4 Ann. c. 16.) if they do not bring an action to try the right, within one year after making ſuch claim, and proſecute the ſame with effect, all perſons whatſoever are barred of whatever right they may have, by force of the ſtatute of non-claim.

BUT, in order to make a fine of any avail at all, it is neceſſary that the parties ſhould have ſome intereſt or eſtate in the lands to be affected by it. Elſe it were poſſible that two ſtrangers, by a mere confederacy, might without any riſque defraud the owners by levying fines of their lands; for if the attempt be diſcovered, they can be no ſufferers, but muſt only remain *in ſtatu quo*: whereas if a tenant for life levies a fine, it is an abſolute forfeiture of his eſtate to the remainder-man or reverſioner [p], if claimed in proper time. It is not therefore to be ſuppoſed that ſuch tenants will frequently run ſo great a hazard; but if they do, and the claim is not duly made within five years after their reſpective terms expire [q], the eſtate is for ever barred by it. Yet where a ſtranger, whoſe preſumption cannot thus be puniſhed, officiouſly interferes in an eſtate which in no wiſe belongs to him,

[n] 3 Rep. 87.
[o] Co. Litt. 372.
[p] *Ibid.* 251.
[q] 2 Lev. 52.

his

his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto [r]) by pleading that "*partes finis nihil habuerunt.*" And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea [s]. Wherefore, when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner [t], and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

IV. THE fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed [u], that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the *nature* of a common recovery; and, secondly, it's *force* and *effect*.

1. AND, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that it's form and method will not be easily understood by the student, who is not yet acquainted

[r] Hob. 334.
[s] 5 Rep. 123. Hardr. 401.
[t] Hardr. 402. 2 Lev. 52.
[u] pag. 117. 271.

with the courſe of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of theſe commentaries. However I ſhall endeavour to ſtate it's nature and progreſs, as clearly and conciſely as I can; avoiding, as far as poſſible, all technical terms, and phraſes not hitherto interpreted.

LET us, in the firſt place, ſuppoſe David Edwards [w] to be tenant of the freehold, and deſirous to ſuffer a common recovery, in order to bar all entails, remainders, and reverſions, and to convey the ſame in fee-ſimple to Francis Golding. To effect this, Golding is to bring an action againſt him for the lands; and he accordingly ſues out a writ, called a *praecipe quod reddat*, becauſe thoſe were it's initial or moſt operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into poſſeſſion of it after one Hugh Hunt had turned the demandant out of it [x]. The ſubſequent proceedings are made up into a record or recovery roll [y], in which the writ and complaint of the demandant are firſt recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is ſuppoſed, at the original purchaſe, to have warranted the title to the tenant; and thereupon he prays, that the ſaid Jacob Morland may be called in to defend the title which he ſo warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, deſires leave of the court to *imparl*, or confer with the vouchee in private; which is (as uſual) allowed him. And ſoon afterwards the demandant, Golding, returns to court, but Morland the vouchee diſappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in queſtion againſt the tenant, Edwards, who is now the recoveree:

[w] See appendix, N°. V.

[x] §. 1.

[y] §. 2.

and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompenſe for the lands ſo warranted by him, and now loſt by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter [z]. This is called the recompenſe, or *recovery in value.* But Jacob Morland having no lands of his own, being uſually the cryer of the court (who, from being frequently thus vouched, is called the *common vouchee*) it is plain that Edwards has only a nominal recompenſe for the lands ſo recovered againſt him by Golding; which lands are now abſolutely veſted in the ſaid recoveror by judgment of law, and ſeiſin thereof is delivered by the ſheriff of the county. So that this colluſive recovery operates merely in the nature of a conveyance in fee-ſimple, from Edwards the tenant in tail, to Golding the purchaſor.

THE recovery, here deſcribed, is with a *ſingle* voucher only; but ſometimes it is with *double*, *treble*, or farther voucher, as the exigency of the caſe may require. And indeed it is now uſual always to have a recovery with double voucher at the leaſt: by firſt conveying an eſtate of freehold to any indifferent perſon, againſt whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee [a]. For, if a recovery be had immediately againſt tenant in tail, it bars only ſuch eſtate in the premiſes of which he is then actually ſeiſed; whereas if the recovery be had againſt another perſon, and the tenant in tail be vouched, it bars every latent right and intereſt which he may have in the lands recovered [b]. If Edwards therefore be tenant of the freehold in poſſeſſion, and John Barker be tenant in tail in remainder, here Edwards doth firſt vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the laſt perſon vouched, and always makes default: whereby the demandant Golding recovers the land againſt the tenant Edwards, and Edwards recovers a recompenſe of equal value againſt Barker the firſt vouchee; who recovers the like againſt Morland the common

[z] pag. 301.

[a] See appendix, pag. xviii.

[b] Bro. *Abr. tit. Taile.* 32 Plowd. 8.

vouchee, againſt whom ſuch ideal recovery in value is always ultimately awarded.

THIS ſuppoſed recompenſe in value is the reaſon why the iſſue in tail is held to be barred by a common recovery. For, if the recoveree ſhould obtain a recompenſe in lands from the common vouchee (which there is a poſſibility in contemplation of law, though a very improbable one, of his doing) theſe lands would ſupply the place of thoſe ſo recovered from him by colluſion, and would deſcend to the iſſue in tail[c]. This reaſon will alſo hold with equal force, as to *moſt* remainder-men and reverſioners; to whom the poſſibility will remain and revert, as a full recompenſe for the reality, which they were otherwiſe entitled to: but it will not *always* hold; and therefore, as Pigott ſays[d], the judges have been even *aſtuti*, in inventing other reaſons to maintain the authority of recoveries. And, in particular, it hath been ſaid, that, though the eſtate-tail is gone from the recoveree, yet it is not *deſtroyed*, but only *transferred*; and ſtill ſubſiſts, and will ever continue to ſubſiſt (by conſtruction of law) in the recoveror, his heirs, and aſſigns: and, as the eſtate-tail ſo continues to ſubſiſt for ever, the remainders or reverſions expectant on the determination of ſuch eſtate-tail can never take place.

TO ſuch awkward ſhifts, ſuch ſubtile refinements, and ſuch ſtrange reaſoning, were our anceſtors obliged to have recourſe, in order to get the better of that ſtubborn ſtatute *de donis*. The deſign, for which theſe contrivances were ſet on foot, was certainly laudable; the unrivetting the fetters of eſtates-tail, which were attended with a legion of miſchiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of juſtice have indeed adopted a more manly way of treating the ſubject; by conſidering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, ſince the ill conſequences of fettered inheritances are now generally ſeen and

c Dr & St. b. 1. dial. 26.

d of com. recov. 13, 14.

allowed, and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*; which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use [e], but also by the precedent of the statute [f] 21 Jac. I. c. 19. which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrollment.

2. THE *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. c. 20. no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-

e See pag. 376. f See pag. 286.

tail,

tail, or the remainder or reverſion of the crown. And by the ſtatute 11 Hen. VII. c. 20. no woman, after her huſband's death, ſhall ſuffer a recovery of lands ſettled on her by her huſband, or ſettled on her huſband and her by any of his anceſtors. And by ſtatute 14 Eliz. c. 8. no tenant for life, of any ſort, can ſuffer a recovery, ſo as to bind them in remainder or reverſion. For which reaſon, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is deſirous to ſuffer a valid recovery; either he, or the tenant to the *praecipe* by him made, muſt *vouch* the remainder-man in tail, otherwiſe the recovery is void: but if he does vouch ſuch remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and ſuffers the recovery to be had againſt the tenant to the *praecipe*, it is as effectual to bar the eſtate-tail as if he himſelf were the recoveree [f].

IN all recoveries it is neceſſary that the recoveree, or tenant to the *praecipe*, as he is uſually called, be actually ſeiſed of the freehold, elſe the recovery is void [g]. For all actions, to recover the ſeiſin of lands, muſt be brought againſt the actual tenant of the freehold, elſe the ſuit will loſe it's effect; ſince the freehold cannot be recovered of him who has it not. And, though theſe recoveries are in themſelves fabulous and fictitious, yet it is neceſſary that there be *actores fabulae*, properly qualified. But the nicety thought by ſome modern practitioners to be requiſite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the proviſions of the ſtatute 14 Geo II. c. 20. which enacts, with a retroſpect and conformity to the antient rule of law [h], that, though the legal freehold be veſted in leſſees, yet thoſe who are entitled to the next freehold eſtate in remainder or reverſion may make a good tenant to the *praecipe*;—that, though the deed or fine which creates ſuch tenant be ſubſequent to the judgment of recovery, yet, if it be in the ſame term, the recovery ſhall be valid in law;—and that, though the recovery itſelf do not appear to be entered, or be not regularly entered, on record, yet the deed

[f] Salk. 571.
[g] Pigot. 28.
[h] Pigott. 41, &c. 4 Burr. 1. 115.

to

to make a tenant to the *praecipe*, and declare the uſes of the recovery, ſhall after a poſſeſſion of twenty years be ſufficient evidence, on behalf of a purchaſor for valuable conſideration, that ſuch recovery was duly ſuffered. And this may ſuffice to give the ſtudent a general idea of common recoveries, the laſt ſpecies of aſſurances by matter of record.

BEFORE I conclude this head, I muſt add a word concerning deeds to *lead*, or to *declare*, the *uſes* of fines, and of recoveries. For if they be levied or ſuffered without any good conſideration, and without any uſes declared, they, like other conveyances, enure only to the uſe of him who levies or ſuffers them [1]. And if a conſideration appears, yet as the moſt uſual fine, "*ſur cognizance de droit come ceo, &c.*" conveys an abſolute eſtate, without any limitations, to the cognizee; and as common recoveries do the ſame to the recoveror, theſe aſſurances could not be made to anſwer the purpoſe of family ſettlements, (wherein a variety of uſes and deſignations is very often expedient) unleſs their force and effect were ſubjected to the direction of other more complicated deeds, wherein particular uſes can be more particularly expreſſed. The fine or recovery itſelf, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vaſt and intricate machine of a voluminous family ſettlement. And, if theſe deeds are made previous to the fine or recovery, they are called deeds to *lead* the uſes; if ſubſequent, deeds to *declare* them. As, if A tenant in tail, with reverſion to himſelf in fee, would ſettle his eſtate on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own eſtate-tail is in being. He therefore uſually, after making the ſettlement propoſed, covenants to levy a fine (or, if there be any intermediate remainders, to ſuffer a recovery) to E, and directs that the ſame ſhall enure to the uſes in ſuch ſettlement mentioned. This is now a deed to *lead* the uſes of the fine or recovery; and the fine when levied, or recovery when ſuffered, ſhall enure to the uſes ſo ſpecified and no other. For though E, the cognizee or recoveror, hath a fee-ſimple

[1] Dyer. 18.

vested in himself by the fine or recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only *to the use* of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses[k]. Or, if a fine or recovery be had without any previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good, as if it had been expresly levied or suffered in consequence of a deed directing it's operation to those particular uses. For by statute 4 & 5 Ann. c. 16. indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds 29 Car. II. c. 3. to the contrary.

[k] This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the appendix, N°.II. §. 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, *viz.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other trustees, for a term of five hundred years; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises: and it is thought proper (for though usual, it is by no means necessary: see Forrester. 167.) that in order to make a good tenant of the freehold, or tenant to the *praecipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *praecipe*, who shall vouch John Barker, and thereby bar his estate-tail, and become tenant to the fee-simple by virtue of such recovery: the uses of which estate, so acquired, are to be those expressed in this deed. Accordingly the parties covenant to do these several acts; (see pag. viii.) and in consequence thereof the fine and recovery are had and suffered (N°. IV. and N°. V.) of which this conveyance is a deed to *lead* the uses.

CHAPTER THE TWENTY-SECOND.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to confider affurances by fpecial cuftom, obtaining only in particular places, and relative only to a particular fpecies of real property. This therefore is a very narrow title; being confined to copyhold lands, and fuch cuftomary eftates, as are holden in antient demefne, or in manors of a fimilar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his figniory, it is therefore a forfeiture of a copyhold [a]. Nor are they transferrable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *furrender;* though in fome manors, by fpecial cuftom, recoveries may be fuffered of copyholds [b]: but thefe differing in nothing material from recoveries of free land, fave only that they are not fuffered in the king's courts, but in the court baron of the manor, I fhall confine myfelf to conveyances by furrender, and their confequences.

SURRENDER, *furfumredditio*, is the yielding up of the eftate by the tenant into the hands of the lord, for fuch purpofes as in the furrender are expreffed. As, it may be, to the ufe and behoof of A and his heirs; to the ufe of his own will; and the like. The procefs, in moft manors, is, that the

[a] Litt. §. 74.

[b] Moor. 637.

tenant

tenant comes to the ſteward, either in court, (or, if the cuſtom permits, out of court) or elſe to two cuſtomary tenants of the ſame manor, provided there be alſo a cuſtom to warrant it; and there by delivering up a rod, a glove, or other ſymbol, as the cuſtom directs, reſigns into the hands of the lord, by the hands and acceptance of his ſaid ſteward, or of the ſaid two tenants, all his intereſt and title to the eſtate; in truſt to be again granted out by the lord, to ſuch perſons and for ſuch uſes as are named in the ſurrender, and the cuſtom of the manor will warrant. If the ſurrender be made out of court, then, at the next or ſome ſubſequent court, the jury or homage muſt preſent and find it upon their oaths; which preſentment is an information to the lord or his ſteward of what has been tranſacted out of court. Immediately upon ſuch ſurrender in court, or upon preſentment of a ſurrender made out of court, the lord by his ſteward grants the ſame land again to *ceſtuy que uſe*, (who is ſometimes, though rather improperly, called the ſurrenderee) to hold by the antient rents and cuſtomary ſervices; and thereupon admits him tenant to the copyhold, according to the form and effect of the ſurrender, which muſt be exactly purſued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the ſymbol, of corporal ſeiſin of the lands and tenements. Upon which admiſſion he pays a fine to the lord according to the cuſtom of the manor, and takes the oath of fealty.

IN this brief abſtract of the manner of transferring copyhold eſtates we may plainly trace the viſible footſteps of the feodal inſtitutions. The fief, being of a baſe nature and tenure, is unalienable without the knowlege and conſent of the lord. For this purpoſe it is reſigned up, or ſurrendered into his hands. Cuſtom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his ſucceſſor; but formerly it was far otherwiſe. And I am apt to ſuſpect that this right is of much the ſame antiquity with the introduction of uſes with reſpect to freehold lands: for the alienee of a copyhold had merely *jus fiduciarium*, for which

there

there was no remedy at law, but only by *sub-poena* in chancery [c]. When therefore the lord had accepted a surrender of his tenant's interest, upon confidence to re-grant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the chancery inforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV [d], was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowlegement for the licence of alienation. Add to this the plain feodal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quid-*" "*libet porrigitur a domino se investituram facere dicente; quae*" "*saltem coram duobus vasallis solemniter fieri debet* [e]:" and, to crown the whole, the oath of fealty is annexed, the very bond of feodal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception, which this northern system of property for a long time obtained in this island; and which communicated itself, or at least it's similitude, even to our very villeins and bondmen.

THIS method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law; but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender it to the use of my last will and testament; and in my will I must declare my intentions,

c Cro. Jac. 568.

d Bro. *Abr. tit. Tenant. per copie.* 10.

e *Feud. l. 2. t. 2.*

tentions, and name a devisee, who will then be entitled to admission [f]. A fine or recovery had of copyhold lands in the king's court may indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee [g], which is defined in the old book of tenures [h] to be "land pleadable at the "common law:" but upon an action on the case, in the nature of a writ of a *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold [i].

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of it's several parts; the surrender, the presentment, and the admittance.

1. A SURRENDER, by an admittance subsequent whereto the conveyance is to receive it's perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser, and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio;* because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can

f Co. Copyh. §. 36.

g Old *Nat. Brev. t. briefe de recto clauso.* F. N. B. 13.

h *t. tenir en franke fee.*

i See Vol. III. p. 166*.

make

make an act good, which was *ab initio* void. Yet, though upon the original surrender the nominee hath but a possibility, it is however such a possibility, as may whenever he pleases be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in chancery, or a *mandamus* [k]: and the surrenderor can in no wise defeat his grant; his hands being for ever bound from disposing of the land in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act [l].

2. As to the *presentment*: that, by the *general* custom of manors, is to be made at the next court baron immediately after the surrender; but by *special* custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon, are wholly void [m]: the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient [n]. So too, if *cestuy que use* dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those, into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron, the party grieved shall find remedy. But if the lord will not do him right and

[k] 2 Roll. Rep. 107.
[l] Co. Copyh. §. 39.
[m] Co. Copyh. 40.
[n] Co. Litt. 62.

justice, he may sue both the lord, and them that took the surrender, in chancery, and shall there find relief [o].

3. ADMITTANCE is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor.

IN admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For, though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the antient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects [p]; nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord [q].

IN admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument: and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender [r].

AND, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord

[o] Co. Copyh. §. 40.

[p] Co. Copyh. §. 41.

[q] 8 Rep. 63.

[r] 4 Rep. 27. Co. Litt. 59.

is

is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case, nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in possession is bound to perform [s].

ADMITTANCES, however, upon surrender differ from admittances upon descent in this: that by surrender nothing is vested in *cestuy que use* before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground [t]; nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to intitle him to his fine, and not so much necessary for the strengthening and compleating the heir's title. Hence indeed an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of his fine. But to this we may reply in

[s] 4 Rep. 27. 1 Rep. 140.

[t] 4 Rep. 23.

the words of sir Edward Coke[u], "I assure myself, if it "were in the election of the heir to be admitted or not "to be admitted, he would be best contented without "admittance; but the custom in every manor is in this "point compulsory. For, either upon pain of forfeiture "of their copyhold, or of incurring some great penalty, "the heirs of copyholders are inforced, in every manor, to "come into court and be admitted according to the cus-"tom, within a short time after notice given of their an-"cestor's decease."

[u] Copyh. §. 41.

CHAPTER THE TWENTY-THIRD.

OF ALIENATION BY DEVISE.

THE laſt method of conveying real property, is by *deviſe*, or diſpoſition contained in a man's laſt will and teſtament. And, in conſidering this ſubject, I ſhall not at preſent inquire into the nature of wills and teſtaments, which are more properly the inſtruments to convey perſonal eſtates; but only into the original and antiquity of deviſing real eſtates by will, and the conſtruction of the ſeveral ſtatutes upon which that power is now founded.

IT ſeems ſufficiently clear, that, before the conqueſt, lands were deviſable by will [a]. But, upon the introduction of the military tenures, the reſtraint of deviſing lands naturally took place, as a branch of the feodal doctrine of non-alienation without the conſent of the lord [b]. And ſome have queſtioned, whether this reſtraint (which we may trace even from the antient Germans [c]) was not founded upon truer principles of policy, than the power of wantonly diſinheriting the heir by will, and transferring the eſtate, through the dotage or caprice of the anceſtor, from thoſe of his blood to utter ſtrangers. For this, it is alleged, maintained the ballance of property, and prevented one man from growing too big or powerful for his neighbours; ſince it rarely happens,

[a] Wright of tenures. 172.

[b] See page 57.

[c] *Tacit. de mor. Germ.* c. 21.

that the ſame man is heir to many others, though by art and management he may frequently become their deviſee. Thus the antient law of the Athenians directed that the eſtate of the deceaſed ſhould always deſcend to his children; or, on failure of lineal deſcendants, ſhould go to the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulation of eſtates. But when Solon [d] made a ſlight alteration, by permitting them (though only on failure of iſſue) to diſpoſe of their lands by teſtament, and deviſe away eſtates from the collateral heir, this ſoon produced an exceſs of wealth in ſome, and of poverty in others: which, by a natural progreſſion, firſt produced popular tumults and diſſentions; and theſe at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total ſubverſion of their ſtate and nation. On the other hand, it would now ſeem hard, on account of ſome abuſes, (which are the natural conſequence of free agency, when coupled with human infirmity) to debar the owner of lands from diſtributing them after his death, as the exigence of his family affairs, or the juſtice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which reſulted from Solon's inſtitution, the too great accumulation of property: which is the natural conſequence of our doctrine of ſucceſſion by primogeniture, to which the Athenians were ſtrangers. Of this accumulation the ill effects were ſeverely felt even in the feodal times: but it ſhould always be ſtrongly diſcouraged in a commercial country, whoſe welfare depends on the number of moderate fortunes engaged in the extenſion of trade.

HOWEVER this be, we find that, by the common law of England ſince the conqueſt, no eſtate, greater than for term of years, could be diſpoſed of by teſtament [e]; except only in Kent, and in ſome antient burghs, and a few particular manors, where their Saxon immunities by ſpecial indulgence ſubſiſted [f]. And though the feodal reſtraint on alienations

[d] Plutarch. *in vita Solon.*

[e] 2 Inſt. 7.

[f] Litt. §. 167. 1 Inſt. 111.

by

by deed vaniſhed very early, yet this on wills continued for ſome centuries after; from an apprehenſion of infirmity and impoſition on the teſtator *in extremis*, which made ſuch deviſes ſuſpicious [g]. Beſides, in deviſes there was wanting that general notoriety, and public deſignation of the ſucceſſor, which in deſcents is apparent to the neighbourhood, and which the ſimplicity of the common law always required in every transfer and new acquiſition of property.

BUT when eccleſiaſtical ingenuity had invented the doctrine of uſes, as a thing diſtinct from the land, uſes began to be deviſed very frequently [h], and the deviſee of the uſe could in chancery compel it's execution. For it is obſerved by Gilbert [j], that, as the popiſh clergy then generally ſate in the court of chancery, they conſidered that men are moſt liberal when they can enjoy their poſſeſſions no longer: and therefore at their death would chooſe to diſpoſe of them to thoſe, who, according to the ſuperſtition of the times, could intercede for their happineſs in another world. But, when the ſtatute of uſes [l] had annexed the poſſeſſion to the uſe, theſe uſes, being now the very land itſelf, became no longer deviſable: which might have occaſioned a great revolution in the law of deviſes, had not the ſtatute of wills been made about five years after, *viz.* 32 Hen. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all perſons being ſeiſed in fee-ſimple (except feme-coverts, infants, ideots and perſons of nonſane memory) might by will and teſtament in writing deviſe to any other *perſon*, except to bodies corporate, two-thirds of their lands, tenements and hereditaments, held in chivalry, and the whole of thoſe held in ſocage: which now, through the alteration of tenures by the ſtatute of Charles the ſecond, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in theſe ſtatutes, to prevent the extenſion of gifts in mortmain; but now, by conſtruction of the ſtatute 43 Eliz. c. 4. it is held, that a deviſe to a corporation for a charitable uſe is valid, as operating in the nature

g Glanv. *l.* 7. *c.* 1.
h Plowd. 414.
j on deviſes. 7.
l 27 Hen. VIII. c. 10. See Dyer. 143.

of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses [k]; it being held that the statute of Elizabeth, which favours appointments to charities, supersedes and repeals all former statutes [l], and supplies all defects of assurances [m]: and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will [n], and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment [o].

WITH regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were allowed to be good wills within the statute [p]. To remedy which, the statute of frauds and perjuries, 29 Car. II. c. 3. directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and intire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child [q].

IN the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the

k Ch. Prec. 272.

l Gilb. Rep. 45. 1 P. Wms. 248.

m Duke's charit. uses. 84.

n Moor. 890.

o 2 Vern. 453. Ch. Prec. 16.

p Dyer. 72. Cro. Eliz. 100.

q Christopher v. Christopher. *Scacch.* 6 Jul. 1771. Spragge v. Stone, at the Cockpit, 27 Mar. 1773. by Wilmot, de Grey, and Parker. See page 502.

beginning of his will, as, "I John Mills do make this my "last will and testament," is a sufficient signing, without any name at the bottom [q]; though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowlege the signing, yet they may do it at different times [r]. But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument [s]. And, in one case determined by the court of king's-bench [t], the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasors and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to

q 3 Lev. 1.

r Freem. 486. 2 Ch. Cas. 109. Pr. Ch. 185.

s 1 P. Wms. 740.

t Stra. 1253.

be

be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. And in a much later case [u] the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

ANOTHER inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir* provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14. hath provided, that all wills, and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee.

A WILL of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law [w], though it is prudent for them so to do, in order to assist their memory when living, and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in it's nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will [x]. Wherefore no after-

[u] M. 31 Geo. II. 4 Bur. I. 430.
[w] See pag. 307, 308.
[x] 1 P. Wms. 575. 11 Mod. 148.

purchased

purchased lands will pass under such devise [y], unless, subsequent to the purchase or contract [z], the devisor republishes his will [a].

WE have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are,

1. THAT the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit [b]. For the maxims of law are, that "*verba intentioni debent inservire*;" and "*benigne interpretamur chartas propter simplicitatem laicorum.*" And therefore the construction must also be *reasonable*, and agreeable to common understanding [c].

2. THAT *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* [d]: but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui haeret in litera, haeret in cortice.* Therefore, by a grant of a remainder a reversion may well pass, and *e converso* [e]. And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither false English nor bad Latin will destroy a deed [f]. Which perhaps a classical critic may think to be no unnecessary caution.

3. THAT the construction be made upon the entire deed, and not merely upon disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio* [g]." And

y Moor. 255. 11 Mod. 127.
z 1 Ch. Cas. 39. 2 Ch. Cas. 144.
a Salk. 238.
b And. 60.
c 1 Bulstr. 175. Hob. 304.
d 2 Saund. 157.
e Hob. 27.
f 10 Rep. 133. Co. Litt. 223. 2 Show. 334.
g 1 Bulstr. 101.

there-

therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other [h]. "*Nam verba debent intelligi cum effectu, ut res magis* "*valeat quem pereat* [i]."

4. THAT the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee [j]. For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him [k]. And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail [l].

5. THAT, if the words will bear two senses, one agreeable to, and another against, law; that sense be preferred, which is most agreeable thereto [m]. As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

h 1 P. Wms. 457.
i Plowd. 156.
j Co. Litt. 42.
k *Ibid.* 134.
l Bacon's Elem. c. 3.
m Co. Litt. 42.

6. THAT,

6. THAT, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected [n]: wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand [o]. Which is owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them [p].

7. THAT a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance [q]; and an estate-tail without words of procreation [r]. By a will also an estate may pass by mere implication, without any express words to direct it's course. As, where a man devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication [s]; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So also, where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have *cross remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail [t]. But, to avoid confusion, no such cross remainders are allowed between more than two devisees [u]: and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly

n Hardr. 94.
o Co. Litt. 112.
p Cro. Eliz. 420. 1 Vern. 30.
q See pag. 108.
r See pag. 115.
s H. 13 Hen. VII. 17. 1 Ventr. 376.
t Freem. 484.
u Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

probable)

probable) and not merely *possible* implications [w]. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses [x], is construed in each with equal favour and benignity, and expounded rather on it's own particular circumstances, than by any general rules of positive law.

AND thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them: we have examined the *tenures*, both antient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feodal origin, in it's notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

THE subject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or

w Vaugh. 262.

x Fitz. 236. 11 Mod. 153.

method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it, as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of: though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages, which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of sir Edward Coke [y]: "albeit the student shall not at any one day, do what he can, "reach to the full meaning of all that is here laid down, yet "let him no way discourage himself but proceed; for on some "other day, in some other place," (or perhaps upon a second perusal of the same) "his doubts will be probably removed."

y Proeme to 1 Inst.

CHAPTER THE TWENTY-FOURTH.

OF THINGS PERSONAL.

UNDER the name of things *perſonal* are included all ſorts of things *moveable*, which may attend a man's perſon wherever he goes; and therefore, being only the objects of the law while they remain within the limits of it's juriſdiction, and being alſo of a periſhable quality, are not eſteemed of ſo high a nature, nor paid ſo much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands, and houſes, and the profits iſſuing thereout. Theſe being conſtantly within the reach, and under the protection of the law, were the principal favourites of our firſt legiſlators: who took all imaginable care in aſcertaining the rights, and directing the diſpoſition, of ſuch property as they imagined to be laſting, and which would anſwer to poſterity the trouble and pains that their anceſtors employed about them; but at the ſame time entertained a very low and contemptuous opinion of all perſonal eſtate, which they regarded as only a tranſient commodity. The amount of it indeed was comparatively very trifling, during the ſcarcity of money and the ignorance of luxurious refinements, which prevailed in the feodal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or ſometimes a much larger proportion, of all the moveables of the ſubject, was frequently laid without ſcruple, and is mentioned with much unconcern by our antient hiſtorians, though now it would juſtly alarm our opulent merchants and ſtockholders. And hence likewiſe may be derived the frequent forfeitures inflicted by the common law,

law, of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our antient law-books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented it's quantity and of course it's value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to antient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

BUT things personal, by our law, do not only include things *moveable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which, sir Edward Coke says[a], is a French word signifying goods. The appellation is in truth derived from the technical Latin word, *catalla*; which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in it's secondary sense was applied to all moveables in general[b]. In the *grand coustumier* of Normandy[c] a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it; the idea of

[a] 1 Inst. 118.

[b] Dufresne. II. 409.

[c] *c.* 87.

goods, or moveables only, being not ſufficiently comprehenſive to take in every thing that the law conſiders as a chattel intereſt. For ſince, as the commentator on the *couſtumier*[d] obſerves, there are two requiſites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of theſe qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* eſtate: the conſequence of which in both laws is, that it muſt be a perſonal eſtate, or chattel.

CHATTELS therefore are diſtributed by the law into two kinds; chattels *real*, and chattels *perſonal*[e].

1. CHATTELS *real*, ſaith ſir Edward Coke[f], as ſuch as concern, or ſavour of, the realty; as terms for years of land, wardſhips in chivalry, (while the military tenures ſubſiſted) the next preſentation to a church, eſtates by a ſtatute-merchant, ſtatute-ſtaple, *elegit*, or the like; of all which we have already ſpoken. And theſe are called real chattels, as being intereſts iſſuing out of, or annexed to real eſtates: of which they have one quality, *viz.* immobility, which denominates them *real;* but want the other, *viz.* a ſufficient, legal, indeterminate duration: and this want it is, that conſtitutes them *chattels.* The utmoſt period for which they can laſt is fixed and determinate, either for ſuch a ſpace of time certain, or till ſuch a particular ſum of money be raiſed out of ſuch a particular income; ſo that they are not equal in the eye of the law to the loweſt eſtate of freehold, a leaſe for another's life: their tenants were conſidered upon feodal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have deſtroyed their intereſt, till the reign of Henry VIII[g]. A freehold, which alone is a real eſtate, and ſeems (as has been ſaid) to anſwer to the fief in Normandy, is conveyed by corporal inveſtiture and

[d] *Il conviendroit quil fuſt non mouuable, et de duree a touſiours. fol.* 107. *a.*

[e] So too, in the Norman law, *Cateux ſont meubles et immeubles: ſicomme vrais meubles ſont qui tranſporter ſe peuvent, et enſuivir le corps; immeubles ſont choſes qui ne peuvent enſuivir le corps, ni eſtre tranſportees, et tout ce qui n'eſt point en heritage.* LL. Will. Nothi, c. 4. *apud* Dufreſne. II. 409.

[f] 1 Inſt. 118.

[g] See page 142.

livery of ſeiſin; which gives the tenant ſo ſtrong a hold of the land, that it never after can be wreſted from him during his life, but by his own act, of voluntary transfer or of forfeiture; or elſe by the happening of ſome future contingency, as in eſtates *pur auter vie*, and the determinable freeholds mentioned in a former chapter [h]. And even theſe, being of an uncertain duration, may by poſſibility laſt for the owner's life; for the law will not preſuppoſe the contingency to happen before it actually does, and till then the eſtate is to all intents and purpoſes a life eſtate, and therefore a freehold intereſt. On the other hand, a chattel intereſt in lands, which the Normans put in oppoſition to fief, and we to freehold, is conveyed by no ſeiſin or corporal inveſtiture, but the poſſeſſion is gained by the mere entry of the tenant himſelf; and it will certainly expire at a time prefixed and determined, if not ſooner. Thus a leaſe for years muſt neceſſarily fail at the end and completion of the term; the next preſentation to a church is ſatisfied and gone the inſtant it comes into poſſeſſion, that is, by the firſt avoidance and preſentation to the living; the conditional eſtates by ſtatutes and *elegit* are determined as ſoon as the debt is paid; and ſo guardianſhips in chivalry expired of courſe the moment that the heir came of age. And if there be any other chattel real, it will be found to correſpond with the reſt in this eſſential quality, that it's duration is limited to a time certain, beyond which it cannot ſubſiſt.

2. CHATTELS *perſonal* are, properly and ſtrictly ſpeaking, things *moveable*; which may be annexed to or attendant on the perſon of the owner, and carried about with him from one part of the world to another. Such are animals, houſehold-ſtuff, money, jewels, corn, garments, and every thing elſe that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to ſpeak in the remainder of this book; having been unavoidably led to conſider the nature of chattels real, and their incidents, in the former chapters which were

[h] page 120.

employed upon real eſtates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteriſtics of each ſpecies of things; the immobility of things real, and the precarious duration of things perſonal.

CHATTEL intereſts being thus diſtinguiſhed and diſtributed, it will be proper to conſider, firſt, the nature of that *property*, or dominion, to which they are liable; which muſt be principally, nay ſolely, referred to perſonal chattels: and, ſecondly, the *title* to that property, or how it may be loſt and acquired. Of each of theſe in it's order.

CHAPTER THE TWENTY-FIFTH.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels perſonal, may be either in *poſſeſſion;* which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or elſe it is in *action;* where a man hath only a bare right, without any occupation or enjoyment. And of theſe the former, or property in *poſſeſſion*, is divided into two ſorts, an *abſolute* and a *qualified* property.

I. FIRST then of property in *poſſeſſion abſolute;* which is where a man hath, ſolely and excluſively, the right, and alſo the occupation, of any moveable chattels; ſo that they cannot be transferred from him, or ceaſe to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: ſuch alſo may be all *vegetable* productions, as the fruit or other parts of a plant, when ſevered from the body of it; or the whole plant itſelf, when ſevered from the ground; none of which can be moved out of the owner's poſſeſſion without his own act or conſent, or at leaſt without doing him an injury, which it is the buſineſs of the law to prevent or remedy. Of theſe therefore there remains little to be ſaid.

BUT with regard to *animals*, which have in themſelves a principle and power of motion, and (unleſs particularly confined) can convey themſelves from one part of the world to

another, there is a great difference made with reſpect to their ſeveral claſſes, not only in our law, but in the law of nature and of all civilized nations. They are diſtinguiſhed into ſuch as are *domitae*, and ſuch as are *ferae naturae*; ſome being of a *tame* and others of a *wild* diſpoſition. In ſuch as are of a nature tame and domeſtic, (as horſes, kine, ſheep, poultry, and the like) a man may have as abſolute a property as in any inanimate beings; becauſe theſe continue perpetually in his occupation, and will not ſtray from his houſe or perſon, unleſs by accident or fraudulent enticement, in either of which caſes the owner does not loſe his property[a]: in which our law agrees with the laws of France and Holland[b]. The ſtealing, or forcible abduction, of ſuch property as this, is alſo felony; for theſe are things of intrinſic value, ſerving for the food of man, or elſe for the uſes of huſbandry[c]. But in animals *ferae naturae* a man can have no abſolute property.

Of all tame and domeſtic animals, the brood belongs to the owner of the dam or mother; the Engliſh law agreeing with the civil, that "*partus ſequitur ventrem*" in the brute creation, though for the moſt part in the human ſpecies it diſallows that maxim. And therefore in the laws of England[d], as well as Rome[e], "*ſi equam meam equus tuus praeg-* "*nantem fecerit, non eſt tuum ſed meum quod natum eſt.*" And, for this, Puffendorf[f] gives a ſenſible reaſon: not only becauſe the male is frequently unknown; but alſo becauſe the dam, during the time of her pregnancy, is almoſt uſeleſs to the proprietor, and muſt be maintained with greater expence and care: wherefore as her owner is the loſer by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the caſe of young cygnets; which belong equally to the owner of the cock and hen, and ſhall be divided between them[g]. But here the reaſons of the general rule ceaſe

a 2 Mod. 319.
b *Vinn. in Inſt. l.* 2. *tit.* 1. §. 15.
c 1 Hal. P. C. 511, 512.
d Bro. *Abr. tit. propertie.* 29.
e *Ff.* 6. 1. 5.
f L. of N. l. 4. c. 7.
g 7 Rep. 17.

and

and "*cessante ratione cessat et ipsa lex*:" for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

II. OTHER animals, that are not of a tame and domestic nature, are either not the objects of property at all, or else fall under our other division, namely, that of *qualified*, *limited*, or *special* property: which is such as is not in it's nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject, I shall in the first place shew, how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

FIRST then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam*, *propter impotentiam*, or *propter privilegium*.

1. A QUALIFIED property may subsist in animals *ferae naturae*, *per industriam hominis*: by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity; and are therefore, say they, called *mansueta*, *quasi manui assueta*. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae*:

turae: and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbets in an inclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi*, which is only to be known by their usual custom of returning[h]. A maxim which is borrowed from the civil law[i]; "*revertendi animum videntur desinere* "*habere tunc, cum revertendi consuetudinem deseruerint.*" The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home, (especially of the carrier kind) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester: all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowlege, and do not return in the usual manner, it is then lawful for any stranger to take them[k]. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him[l]: but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law[m]. And to the same pur-

h Bracton. *l.* 2. *c.* 1. 7 Rep. 17.
i *Inst.* 2. 1. 15.
k Finch. L. 177.
l Crompt. of courts. 167. 7 Rep. 16.
m Puff. *l.* 4. *c.* 6. §. 5. *Inst.* 2. 1. 14.

pose,

pose, not to say in the same words, with the civil law, speaks Bracton [n]: occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said [o], that with us the only ownership in bees is *ratione soli*; and the charter of the forest [p], which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

IN all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their antient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine: and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals [q]: but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds [r]; because their value is not intrinsic, but depending only on the caprice of the owner [s]: though it is such an invasion of property as may

n *l.* 2. *c.* 1. §. 3.
o Bro. *Abr. tit. propertie.* 37. cites 43 Edw. III. 24.
p 9 Hen. III. c. 13.
q 1 Hal. P. C. 512.
r Lamb. Eiren. 275.
s 7 Rep. 18. 3 Inst. 109.

amount

amount to a civil injury, and be redressed by a civil action [t]. Yet to steal a reclaimed hawk is felony both by common law and statute [u]; which seems to be a relic of the tyranny of our antient sportsmen. And, among our elder ancestors the antient Britons, another species of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's houshold, and was the *custos borrei regii*, for which there was a very peculiar forfeiture [w]. And thus much of qualified property in wild animals, reclaimed *per industriam.*

2. A QUALIFIED property may also subsist with relation to animals *ferae naturae*, *ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires [x]: but, till then, it is in some cases trespass, and in others, felony, for a stranger to take them away [y]. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. A MAN may, lastly, have a qualified property in animals *ferae naturae*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion

t Bro. *Abr. tit. trespass.* 407.

u 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

w "*Si quis felem, borrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudae tritico co-operiatur.*" Wotton. *LL. Wall.* l. 3. *c.* 5. §. 5. An amercement similar to which, sir Edward Coke tells us, (7 Rep. 18.) there antiently was for stealing swans; only suspending them by the beak, instead of the tail.

x *Carta de forest.* 9 Hen. III. c. 13.

y 7 Rep. 17. Lamb. Eiren. 274.

clusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty [z]; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shewn in a subsequent chapter.

THE qualified property which we have hitherto considered, extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's antient windows [a], corrupts the air of his house or gardens [b], fouls his water [c], or unpens and lets it out, or if he diverts an antient watercourse that used to run to the other's mill or meadow [d]; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership,

z Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.
a 9 Rep. 58.
b *Ibid.* 59. Lut. 92.
c 9 Rep. 59.
d 1 Leon. 273. Skin. 389.

As in caſe of *bailment*, or delivery of goods to another perſon for a particular uſe; as to a carrier to convey to London, to an innkeeper to ſecure in his inn, or the like. Here there is no abſolute property in either the bailor or the bailee, the perſon delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate poſſeſſion; the bailee hath the poſſeſſion, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in caſe the goods be damaged or taken away: the bailee on account of his immediate poſſeſſion; the bailor, becauſe the poſſeſſion of the bailee is, immediately, his poſſeſſion alſo [e]. So alſo in caſe of goods pledged or pawned upon condition, either to repay money or otherwiſe; both the pledgor and pledgee have a qualified, but neither of them an abſolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of re-payment, *&c*; and ſo too is that of the pledgee, which depends upon it's non-performance [f]. The ſame may be ſaid of goods diſtrained for rent, or other cauſe of diſtreſs: which are in the nature of a pledge, and are not, at the firſt taking, the abſolute property of either the diſtreinor, or party diſtreined upon; but may be redeemed, or elſe forfeited, by the ſubſequent conduct of the latter. But a ſervant, who hath the care of his maſter's goods or chattels, as a butler of plate, a ſhepherd of ſheep, and the like, hath not any property or poſſeſſion either abſolute or qualified, but only a mere charge or overſight [g].

HAVING thus conſidered the ſeveral diviſions of property in *poſſeſſion*, which ſubſiſts there only, where a man hath both the right and alſo the occupation of the thing; we will proceed next to take a ſhort view of the nature of property in *action*, or ſuch where a man hath not the occupation, but merely a bare right to occupy the thing in queſtion; the poſſeſſion whereof may however be recovered by a ſuit or action at law: from whence the thing ſo recoverable is called

[e] 1 Roll. Abr. 607.

[f] Cro. Jac. 245.

[g] 3 Inſt. 108.

a thing,

a thing, or *chose, in action*[h]. Thus money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action: for though a right to some recompense vests in me, at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

AT present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or it's equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather in *potentia* than in *esse*: though the owner may have as absolute a pro-

h The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus.*" (*Ff.* 41. 1. 52.) And again, "*aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et haec in bonis esse videntur.*" (*Ff.* 50. 16. 49.)

perty in, and be as well entitled to, such things in action, as to things in possession.

AND, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

FIRST, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted [i]: though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee [k]; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded [l]: and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation [m]. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

[i] 1 Equ. Cas. abr. 360.
[k] Mar. 106.
[l] 2 Freem. 206.
[m] 1 P. Wms. 290.

NEXT,

NEXT, as to the *number* of *owners*. Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements [n]. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship [o]. So also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common [p]; as we have formerly seen [q], the same words would have done, in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property; and there shall be no survivorship therein [r].

[n] Litt. §. 282. 1 Vern. 482.
[o] Litt. §. 321.
[p] 1 Equ. Caf. abr. 292.
[q] pag. 193.
[r] 1 Vern. 217. Co. Litt. 182.

CHAPTER THE TWENTY-SIXTH.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift, or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

AND, first, a property in goods and chattels may be acquired by *occupancy*: which we have more than once[a] remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which

[a] See pag. 3. 8. 258.

has once been acquired by the owner. And, where ſuch things are found without any other owner, they for the moſt part belong to the king by virtue of his prerogative; except in ſome few inſtances, wherein the original and natural right of occupancy is ſtill permitted to ſubſiſt, and which we are now to conſider.

1. THUS, in the firſt place, it hath been ſaid, that any body may ſeiſe to his own uſe ſuch goods as belong to an alien enemy [b]. For ſuch enemies, not being looked upon as members of our ſociety, are not entitled during their ſtate of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to ſeiſe upon their chattels, without being compelled as in other caſes to make reſtitution or ſatisfaction to the owner. But this, however generally laid down by ſome of our writers, muſt in reaſon and juſtice be reſtrained to ſuch captors as are authorized by the public authority of the ſtate, reſiding in the crown [c]; and to ſuch goods as are brought into this country by an alien enemy, after a declaration of war, without a ſafe-conduct or paſſport. And therefore it hath been holden [d], that where a foreigner is reſident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be ſeiſed. It hath alſo been adjudged, that if an enemy take the goods of an Engliſhman, which are afterwards retaken by another ſubject of this kingdom, the former owner ſhall loſe his property therein, and it ſhall be indefeaſibly veſted in the ſecond taker; unleſs they were retaken the ſame day, and the owner before ſun-ſet puts in his claim of property [e]. Which is agreeable to the law of nations, as underſtood in the time of Grotius [f], even with regard to captures made at ſea; which were held to be the property of the captors after a poſſeſſion of twenty-four hours; though the modern authorities [g] require, that before the property can be changed, the goods muſt have been brought into port,

[b] Finch. L. 178.

[c] Freem. 40.

[d] Bro. *Abr. tit. propertie.* 38. *forfeiture.* 57.

[e] *Ibid.*

[f] *de j. b. & p. l.* 3. *c.* 6. §. 3.

[g] Bynkerſh. *quaeſt. jur. publ. I.* 4. Rocc. *de Aſſecur. not.* 66.

and have continued a night *intra praesidia*, in a place of safe custody, so that all hope of recovering them was lost.

AND, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war [h]; at least till his ransom be paid [j]. And this doctrine seems to have been extended to negro-servants [i], who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of their masters who buy them: though, accurately speaking, that property (if it indeed continues) consists rather in the perpetual *service*, than in the *body* or *person* of the captive [k].

2. THUS again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen [l], are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour

h Bro. *Abr. tit. propertie.* 18.

j We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius* "*A. apud W. (in qua idem A. quendam* "*H. Scotum per ipsum A. de guerra cap-* "*tum tanquam prisonem suum, quousque* "*sibi de centum libris, per quas idem H.* "*redemptionem suam cum praefato A. pro* "*vita sua salvanda fecerat satisfactum* "*foret, detinuit) fregit, et ipsum H. ce-* "*pit et abduxit, vel quo voluit abire per-* "*misit, &c.*"

i 2 Lev. 201.

k Carth. 396. Ld. Raym. 147. Salk. 667.

l Book I. ch. 8.

makes a tan-yard, ſo as to annoy and render leſs ſalubrious the air of my houſe or gardens, the law will furniſh me with a remedy; but if he is firſt in poſſeſſion of the air, and I fix my habitation near him, the nuſance is of my own ſeeking, and may continue. If a ſtream be unoccupied, I may erect a mill thereon, and detain the water; yet not ſo as to injure my neighbour's prior mill, or his meadow: for he hath by the firſt occupancy acquired a property in the current.

4. WITH regard likewiſe to animals *ferae naturae*, all mankind had by the original grant of the creator a right to purſue and take any fowl or inſect of the air, any fiſh or inhabitant of the waters, and any beaſt or reptile of the field: and this natural right ſtill continues in every individual, unleſs where it is reſtrained by the civil laws of the country. And when a man has once ſo ſeiſed them, they become while living his *qualified* property, or, if dead, are *abſolutely* his own: ſo that to ſteal them, or otherwiſe invade this property, is, according to their reſpective values, ſometimes a criminal offence, ſometimes only a civil injury. The reſtrictions which are laid upon this right, by the laws of England, relate principally to royal fiſh, as whale and ſturgeon, and ſuch terreſtrial, aërial, or aquatic animals as go under the denomination of *game;* the taking of which is made the excluſive right of the prince, and ſuch of his ſubjects to whom he has granted the ſame royal privilege. But thoſe animals, which are not expreſsly ſo reſerved, are ſtill liable to be taken and appropriated by any of the king's ſubjects, upon their own territories; in the ſame manner as they might have taken even game itſelf, till theſe civil prohibitions were iſſued: there being in nature no diſtinction between one ſpecies of wild animals and another, between the right of acquiring property in a hare or a ſquirrel, in a partridge or a butterfly: but the difference, at preſent made, ariſes merely from the poſitive municipal law.

5. To this principle of occupancy alſo muſt be referred the method of acquiring a ſpecial perſonal property in corn growing on the ground, or other *emblements*, by any *poſſeſſor*

of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills [m], and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action [n]: and by the statute 11 Geo. II. c. 19. though not by the common law [o], they may be distreined for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given [p]; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground [q].

6. THE doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such it's state of improvement [r]: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted [s]. And these doctrines are implicitly copied and adopted by our Bracton [t], and have since been confirmed

m Perk. §. 512.
n Bro. *Abr. tit. emblements.* 21. 5 Rep. 116.
o 1 Roll. Abr. 666.
p page 122. 146.
q 3 Inst. 109.
r *Inst.* 2. 1. 25, 26. 31. *Ff.* 6. 1. 5.
s *Inst.* 2. 1. 25. 34.
t *l.* 2. *c.* 2 & 3.

by many resolutions of the courts [u]. It hath even been held, that if one takes away and cloaths another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman [w].

7. BUT in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares [x]. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowlege, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost [y]. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent [z].

8. THERE is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke [a], and many others [b], to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the

u Bro. *Abr. tit. propertie.* 23 Moor. 20. Poph. 38.

w Moor. 214.

x *Inst.* 2. 1. 27, 28. 1 Vern. 217.

y *Inst.* 2. 1. 28.

z Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Vern. 516.

a on Gov. part 2. ch. 5.

b See page 8.

diſpoſition he has made of it, appears to be an invaſion of that right. Now the identity of a literary compoſition conſiſts intirely in the *ſentiment* and the *language;* the ſame conceptions, cloathed in the ſame words, muſt neceſſarily be the ſame compoſition: and whatever method be taken of exhibiting that compoſition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is ſo exhibited; and no other man (it hath been thought) can have a right to exhibit it, eſpecially for profit, without the author's conſent. This conſent may perhaps be tacitly given to all mankind, when an author ſuffers his work to be publiſhed by another hand, without any claim or reſerve of right, and without ſtamping on it any marks of ownerſhip; it being then a preſent to the public, like building a church or bridge, or laying out a new highway: but, in caſe the author ſells a ſingle book, or totally grants the copyright, it hath been ſuppoſed, in the one caſe, that the buyer hath no more right to multiply copies of that book for ſale, than he hath to imitate for the like purpoſe the ticket which is bought for admiſſion to an opera or a concert; and that, in the other, the whole property, with all it's excluſive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the excluſive property of the manuſcript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or publiſhed; yet from the inſtant of publication, the excluſive right of an author or his aſſigns to the ſole communication of his ideas immediately vaniſhes and evaporates; as being a right of too ſubtile and unſubſtantial a nature to become the ſubject of property at the common law, and only capable of being guarded by poſitive ſtatutes and ſpecial proviſions of the magiſtrate.

THE Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing ſhould belong to the owner of the blank materials [c]: meaning thereby the mechanical operation of writing, for which it directed the

[c] *Si in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius ſed tu dominus eſſe videris. Inſt.* 2. 1. 33. See page 404.

ſcribe

ſcribe to receive a ſatisfaction; for, in works of genius and invention, as in painting on another man's canvas, the ſame law [d] gave the canvas to the painter. As to any other property in the works of the underſtanding, the law is ſilent; though the ſale of literary copies, for the purpoſes of recital or multiplication, is certainly as antient as the times of Terence [e], Martial [f], and Statius [g]. Neither with us in England hath there been (till very lately) any final [h] determination upon the right of authors at the common law.

BUT whatever inherent copyright might have been ſuppoſed to ſubſiſt by the common law, the ſtatute 8 Ann. c. 19. (amended by ſtatute 15 Geo. III. c. 53.) hath now declared that the author and his aſſigns ſhall have the ſole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* [i]; and hath alſo protected that property by additional penalties and forfeitures: directing farther, that if, at the end of that term, the author himſelf be living, the right ſhall then return to him for another term of the ſame duration:—and a ſimilar privilege is extended to the inventors of prints and engravings, for the term of eight and twenty years, by the ſtatutes 8 Geo. II. c. 13. and 7 Geo. III. c. 38. beſides an action for damages, with double coſts, by ſtatute 17 Geo. III. c. 57. All which parliamentary protections appear to have been ſuggeſted by the exception in the ſtatute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the ſole working or making of the ſame; by virtue whereof it is held, that a temporary property therein becomes veſted in the king's patentee [k].

d *Ibid.* §. 34.

e *Prol. in Eunuch.* 20.

f *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

g *Juv.* vii. 83.

h Since this was firſt written, it was determined in the caſe of *Millar v. Taylor* in *B. R. Paſch.* 9 Geo. III. 1769, that an excluſive and permanent copyright in authors ſubſiſted by the common law. But afterwards, in the caſe of *Donaldſon v. Becket*, before the houſe of lords, 22 *Febr.* 1774, it was held that no copyright now ſubſiſts in authors, after the expiration of the ſeveral terms created by the ſtatute of queen Anne.

i By ſtatute 15 Geo. III. c. 53. ſome additional privileges in this reſpect are granted to the univerſities, and certain other learned ſocieties.

k 1 Vern. 62.

CHAPTER THE TWENTY-SEVENTH.

OF TITLE BY PREROGATIVE, AND FORFEITURE.

A SECOND method of acquiring property in personal chattels is by the *king's prerogative:* whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an antient grant.

SUCH in the first place are all *tributes*, *taxes*, and *customs;* whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or antient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires and the subject loses a property, the instant they become due: if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the antient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

IN

IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person [a]; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel [b]; and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt [c]. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person [d]: from which two principles it is a necessary consequence, that the innocent though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the

[a] See pag. 184.

[b] Fitzh. *Abr. t. dette*, 38. Plowd. 243.

[c] Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.

[d] Co. Litt. 30.

like;

like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

THERE is also a kind of prerogative *copyright* subsisting in certain books, which is held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament*, *proclamations*, and *orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine service*. 3. He is also said to have a right by purchase to the copies of such *law books*, *grammars*, and other compositions, as were compiled or translated at the expence of the crown. And upon these two last principles, combined, the exclusive right of printing the translation of the *bible* is founded.

THERE still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *ferae naturae*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter [f]:

[f] pag. 38, 39.

the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

IN the first place then we have already shewn, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*ferae igitur bestiae, et volucres, et omnia animalia quae mari, cœlo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur* [g]." But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may, or may not, be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorise [h]. Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and

g *Inst.* 2. 1. 12.

h Puff. L. N. l. 4. c. 6. §. 5.

others

others of lower rank; which would be the unavoidable consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people [i]: which last is a reason oftner meant, than avowed, by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed: since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.

YET, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowlege that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi* "*gratia, potest a domino prohiberi ne ingrediatur* [k]." For if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law [l] interdicts "*venationes, et sylvaticas vagationes cum canibus et acci*-"*pitribus*," to all *clergymen* without distinction; grounded on

i Warburton's alliance. 324.

k *Inst.* 2. 1. §. 12.

l *Decretal. l.* 5. *tit.* 24. *c.* 2.

a saying of St. Jerom [m], that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar [n], concur in the same prohibition: though our secular laws, at least after the conquest, did even in the times of popery dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king's prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof [o].

BUT, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feodal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe, on the ruins of the western empire. For when a conquering general came to settle the oeconomy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions [p], one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game.

m *Decret. part.* 1. *dist.* 34. *l.* 1.

n *cap.* 64.

o 4 Inst. 309.

p *Feud. l.* 2. *tit.* 27. §. 5.

This

This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport [q] which in it's pursuit and slaughter bore some resemblance to war. *Vita omnis*, (says Caesar, speaking of the antient Germans,) *in venationibus atque in studiis rei militaris consistit* [r]. And Tacitus in like manner observes, that *quoties bella non ineunt, multum venatibus, plus per otium transigunt* [s]. And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning, than was couched in such rude ditties, as were sung at the solemn carousals which succeeded these antient huntings. And it is remarkable that, in those nations where the feodal policy remains the most uncorrupted, the forest or game laws continue in their highest rigor. In France all game is properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility [t].

WITH us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chace, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desart tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary for-

[q] In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published *A. D.* 1205. there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

[r] *De Bell. Gall. l.* 6. *c.* 20.

[s] *c.* 15.

[t] Mattheus *de Crimin. c.* 3. *tit.* 1. Carpzov. *Practic. Saxonic. p.* 2. *c.* 84.

feiture for ſuch as interfered with their ſovereign. But every freeholder had the full liberty of ſporting upon his own territories, provided he abſtained from the king's foreſts: as is fully expreſſed in the laws of Canute [v], and of Edward the Confeſſor [u]: "*ſit quilibet homo dignus venatione ſua, in* "*ſylva, et in agris, ſibi propriis; et in dominio ſuo: et abſtineat* "*omnis homo a venariis regiis, ubicunque pacem eis habere volue-* "*rit*:" which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. "*Cui-* "*que enim in proprio fundo quamlibet feram quoquo modo venari* "*permiſſum* [w]."

HOWEVER, upon the Norman conqueſt, a new doctrine took place; and the right of purſuing and taking all beaſts of chaſe or *venary*, and ſuch other animals as were accounted *game*, was then held to belong to the king, or to ſuch only as were authorized under him. And this, as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the univerſal foil, to enter thereon, and to chaſe and take ſuch creatures at his pleaſure: as alſo upon another maxim of the common law, which we have frequently cited and illuſtrated, that theſe animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As therefore the former reaſon was held to veſt in the king a *right* to purſue and take them any where; the latter was ſuppoſed to give the king, and ſuch as he ſhould authorize, a *ſole* and *excluſive* right.

THIS right, thus newly veſted in the crown, was exerted with the utmoſt rigor, at and after the time of the Norman eſtabliſhment; not only in the antient foreſts, but in the new ones which the conqueror made, by laying together vaſt tracts of country, depopulated for that purpoſe, and re-

[v] *c.* 77.
[u] *c.* 36.

[w] Stiernhoek *de jure Sueon. l.* 2. *c.* 8.

ſerved

ſerved ſolely for the king's royal diverſion; in which were exerciſed the moſt horrid tyrannies and oppreſſions, under colour of foreſt law, for the ſake of preſerving the beaſts of chaſe; to kill any of which, within the limits of the foreſt, was as penal as the death of a man. And, in purſuance of the ſame principle, king John laid a total interdict upon the *winged* as well as the *fourfooted* creation: "*capturam avium per totam Angliam interdixit* [x]." The cruel and inſupportable hardſhips, which theſe foreſt laws created to the ſubject, occaſioned our anceſtors to be as zealous for their reformation, as for the relaxation of the feodal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foreſta* as warmly contended for, and extorted from the king with as much difficulty, as thoſe of *magna carta* itſelf. By this charter, confirmed in parliament [y], many foreſts were diſafforeſted, or ſtripped of their oppreſſive privileges, and regulations were made in the regimen of ſuch as remained; particularly [z] killing the king's deer was made no longer a capital offence, but only puniſhed by a fine, impriſonment, or abjuration of the realm. And by a variety of ſubſequent ſtatutes, together with the long acquieſcence of the crown without exerting the foreſt laws, this prerogative is now become no longer a grievance to the ſubject.

BUT, as the king reſerved to himſelf the *foreſts* for his own excluſive diverſion, ſo he granted out from time to time other tracts of lands to his ſubjects under the names of *chaſes* or *parks* [a], or gave them licence to make ſuch in their own grounds; which indeed are ſmaller foreſts, in the hands of a ſubject, but not governed by the foreſt laws: and by the common law no perſon is at liberty to take or kill any beaſts of chaſe, but ſuch as hath an antient chaſe or park; unleſs they be alſo beaſts of prey.

x M. Paris. 303.
y 9 *Hen. III.*
z *cap.* 10.
a See pag. 38.

As to all inferior ſpecies of game, called beaſts and fowls of warren, the liberty of taking or killing them is another franchiſe or royalty, derived likewiſe from the crown, and called *free warren;* a word, which ſignifies preſervation or cuſtody: as the excluſive liberty of taking and killing fiſh in a public ſtream or river is called a *free fiſhery;* of which however no new franchiſe can at preſent be granted, by the expreſs proviſion of *magna carta*, c. 16.[b] The principal intention of granting to any one theſe franchiſes or liberties was in order to protect the game, by giving the grantee a ſole and excluſive power of killing it himſelf, provided he prevented other perſons. And no man, but he who has a chaſe or free warren, by grant from the crown, or preſcription which ſuppoſes one, can juſtify hunting or ſporting upon another man's ſoil; nor indeed, in thorough ſtrictneſs of common law, either hunting or ſporting at all.

HOWEVER novel this doctrine may ſeem, to ſuch as call themſelves *qualified* ſportſmen, it is a regular conſequence from what has been before delivered; that the ſole right of taking and deſtroying game belongs excluſively to the king. This appears, as well from the hiſtorical deduction here made, as becauſe he may grant to his ſubjects an excluſive right of taking them; which he could not do, unleſs ſuch a right was firſt inherent in himſelf. And hence it will follow, that no perſon whatever, but he who has ſuch derivative right from the crown, is by common law entitled to take or kill any beaſts of chaſe, or other game whatſoever. It is true, that, by the acquieſcence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain ſtatutes for preſerving the game, this excluſive prerogative of the king is little known or conſidered; every man, that is exempted from theſe modern penalties, looking upon himſelf as at liberty to do what he pleaſes with the game: whereas the contrary is ſtrictly true, that no man, however well *qualified* he

[b] Mirr. c. 5. §. 2. See page 40.

may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can shew a particular grant of free warren; or a prescription, which presumes a grant; or some authority under an act of parliament. As for the latter, I recollect but two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. cap. 27. altered by 7 Jac. I. cap. 11. and virtually repealed by 22 & 23 Car. II. c. 25. which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate, (and their servants) to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold: the other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which with some alteration still subsists, and plainly supposes such power not to have been in them before. The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these commentaries) do indeed *qualify* nobody, except in the instance of a gamekeeper, to kill game: but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offence, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects, from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorised* to kill game. The circumstance of having 100*l.* *per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

UPON the whole it appears, that the king, by his prerogative, and ſuch perſons as have, under his authority, the royal franchiſes of chaſe, park, free warren, or free fiſhery, are the *only* perſons who may acquire any property, however fugitive and tranſitory, in theſe animals *ferae naturae*, while living; which is ſaid to be veſted in them, as was obſerved in a former chapter, *propter privilegium*. And it muſt alſo be remembered, that ſuch perſons as may thus lawfully hunt, fiſh, or fowl, *ratione privilegii*, have (as has been ſaid) only a qualified property in theſe animals: it not being abſolute or permanent, but laſting only ſo long as the creatures remain within the limits of ſuch reſpective franchiſe or liberty, and ceaſing the inſtant they voluntarily paſs out of it. It is held indeed, that if a man ſtarts any game within his own grounds, and follows into another's, and kills it there, the property remains in himſelf [c]. And this is grounded on reaſon and natural juſtice [d]: for the property conſiſts in the poſſeſſion; which poſſeſſion commences by the finding it in his own liberty, and is continued by the immediate purſuit. And ſo, if a ſtranger ſtarts game in one man's chaſe or free warren, and hunts it into another liberty, the property continues in the owner of the chaſe or warren; this property ariſing from privilege [e], and not being changed by the act of a mere ſtranger. Or if a man ſtarts game on another's private grounds and kills it there, the property belongs to him in whoſe ground it was killed, becauſe it was alſo ſtarted there [f]; this property ariſing *ratione ſoli*. Whereas if, after being ſtarted there, it is killed in the grounds of a third perſon, the property belongs not to the owner of the firſt ground, becauſe the property is local; nor yet to the owner of the ſecond, becauſe it was not ſtarted in his ſoil; but it veſts in the perſon who ſtarted and killed it [g], though guilty of a treſpaſs againſt both the owners.

c 11 Mod. 75.

d Puff. L. N. l. 4. c. 6.

e Lord Raym. 251.

f *Ibid.*

g Farr. 18. Lord Raym. *ibid.*

III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and loſt, *viz.* by *forfeiture*; as a puniſhment for ſome crime or miſdemeſnor in the party forfeiting, and as a compenſation for the offence and injury committed againſt him to whom they are forfeited. Of forfeitures, conſidered as the means whereby *real* property might be loſt and acquired, we treated in a former chapter [h]. It remains therefore in this place only to mention by what means, or for what offences, goods and chattels become liable to forfeiture.

IN the variety of penal laws with which the ſubject is at preſent encumbered, it were a tedious and impracticable taſk to reckon up the various forfeitures, inflicted by ſpecial ſtatutes, for particular crimes and miſdemeſnors: ſome of which are *mala in ſe*, or offences againſt the divine law, either natural or revealed; but by far the greateſt part are *mala prohibita*, or ſuch as derive their guilt merely from their prohibition by the laws of the land: ſuch as is the forfeiture of 40*s*. *per* month by the ſtatute 5 Eliz. c. 4. for exerciſing a trade without having ſerved ſeven years as an apprentice thereto; and the forfeiture of 10*l*. by 9 Ann. c. 23. for printing an almanack without a ſtamp. I ſhall therefore confine myſelf to thoſe offences only; by which *all* the goods and chattels of the offender are forfeited: referring the ſtudent for ſuch, where pecuniary mulcts of different quantities are inflicted, to their ſeveral proper heads, under which very many of them have been or will be mentioned; or elſe to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as moſt of theſe forfeitures belong to the crown, they may ſeem as if they ought to have been referred to the preceding method of acquiring perſonal property, namely, by prerogative. But as, in the inſtance of partial forfeitures, a moiety often goes to the informer, the poor, or ſometimes to other perſons; and as one total forfeiture, namely that by a bankrupt who is guilty of felony by conceal-

h See page 267.

ing

ing his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

GOODS and chattels then are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason*; of *felony* in general, and particular of *felony de se*, and of *manslaughter*; nay even by conviction of *excusable homicide*[1]; by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight* in treason or felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *striking* any one *in the presence of the king's courts*; by *praemunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad* of artificers; and by *challenging to fight* on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these commentaries, induce a total forfeiture of goods and chattels.

AND this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

[1] Co. Litt. 391. 2 Inst. 316. 3 Inst. 320.

CHAPTER THE TWENTY-EIGHTH.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things perſonal, or chattels, is by *cuſtom*: whereby a right veſts in ſome particular perſons, either by the local uſage of ſome particular place, or by the almoſt general and univerſal uſage of the kingdom. It were endleſs, ſhould I attempt to enumerate all the ſeveral kinds of ſpecial cuſtoms, which may entitle a man to a chattel intereſt in different parts of the kingdom: I ſhall therefore content myſelf with making ſome obſervations on three ſorts of cuſtomary intereſts, which obtain pretty generally throughout moſt parts of the nation, and are therefore of more univerſal concern; viz. *heriots*, *mortuaries*, and *heir-looms*.

1. HERIOTS, which were ſlightly touched upon in a former chapter [a], are uſually divided into two ſorts, heriot-*ſervice*, and heriot-*cuſtom*. The former are ſuch as are due upon a ſpecial reſervation in a grant or leaſe of lands, and therefore amount to little more than a mere rent [b]: the latter ariſe upon no ſpecial reſervation whatſoever, but depend merely upon immemorial uſage and cuſtom [c]. Of theſe therefore we are here principally to ſpeak: and they are defined to be a cuſtomary tribute of goods and chattels, payable to the lord of the fee on the deceaſe of the owner of the land.

[a] page 97.
[b] 2 Saund. 166.
[c] Co. Cop. §. 24.

THE

THE first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of king Canute [d] the several *heregeates* or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman [e], signifies. These were delivered up to the sovereign on the death of the vasal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the conqueror fashion his law of reliefs, as was formerly observed [f]; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feodal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money [g].

The Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in socage estates do frequently remain to this day, in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary [h]. These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowlegement of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the

d *c.* 69.
e of feuds. *c.* 18.
f page 65.
g *LL. Guil. Conq. c.* 22, 23, 24.
h Lambard. Peramb. of Kent. 492.

one hand confirmed the tenant's intereſt in excluſion of the lord's will, has on the other hand eſtabliſhed this diſcretional piece of gratitude into a permanent duty. An heriot may alſo appertain to free land, that is held by ſervice and ſuit of court; in which caſe it is moſt commonly a copyhold enfranchiſed, whereupon the heriot is ſtill due by cuſtom. Bracton [i] ſpeaks of heriots as frequently due on the death of both ſpecies of tenants: "*eſt quidem alia praeſtatio quae nomi-* "*natur heriettum; ubi tenens, liber vel ſervus, in morte ſua* "*dominum ſuum, de quo tenuerit, reſpicit de meliori averio ſuo,* "*vel de ſecundo meliori, ſecundum diverſam locorum conſuetudi-* "*nem.*" And this he adds, "*magis fit de gratia quam de* "*jure;*" in which Fleta [k] and Britton [l] agree: thereby plainly intimating the original of this cuſtom to have been merely voluntary, as a legacy from the tenant; though now the immemorial uſage has eſtabliſhed it as of right in the lord.

THIS heriot is ſometimes the beſt live beaſt, or *averium*, which the tenant dies poſſeſſed of, (which is particularly denominated the villein's relief in the twenty-ninth law of king William the conqueror) ſometimes the beſt inanimate good, under which a jewel or piece of plate may be included: but it is always a *perſonal* chattel, which, immediately on the death of the tenant who was the owner of it, being aſcertained by the option of the lord [m], becomes veſted in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant muſt be the owner of it, elſe it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for ſhe can have no ownerſhip in things perſonal [n]. In ſome places there is a cuſtomary compoſition in money, as ten or twenty ſhillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indiſputably ancient cuſtom: but a new compoſition of this ſort will not bind the repreſentatives of either party; for that amounts to the creation of a new cuſtom, which is now impoſſible [o].

i *l.* 2. *c.* 36. §. 9.
k *l.* 3. *c.* 18.
l *c.* 69.
m Hob. 60.
n Keilw. 84. 4 Leon. 239.
o Co. Cop. §. 31.

2. MORTUARIES are a ſort of eccleſiaſtical heriots, being a cuſtomary gift claimed by and due to the miniſter in very many pariſhes on the death of his pariſhioners. They ſeem originally to have been, like lay heriots, only a voluntary bequeſt to the church; being intended, as Lyndewode informs us from a conſtitution of archbiſhop Langham, as a kind of expiation and amends to the clergy for the perſonal tithes, and other eccleſiaſtical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpoſe, *after* [p] the lord's heriot or beſt good was taken out, the ſecond beſt chattel was reſerved to the church as a mortuary: "*ſi decedens plura habuerit animalia, optimo cui de jure* "*fuerit debitum reſervato, eccleſiae ſuae ſine dolo, fraude, ſeu* "*contradictione qualibet, pro recompenſatione ſubtractionis deci*-"*marum perſonalium, nechon et oblationum, ſecundum melius ani*-"*mal reſervetur, poſt obitum, pro ſalute animae ſuae* [q]." And therefore in the laws of king Canute [r] this mortuary is called ſoul-ſcot (ſaplſceat) or *ſymbolum animae*. And, in purſuance of the ſame principle, by the laws of Venice, where no perſonal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables [s]. So alſo, by a ſimilar policy, in France, every man that died without bequeathing a part of his eſtate to the church, which was called *dying without confeſſion*, was formerly deprived of chriſtian burial: or, if he died inteſtate, the relations of the deceaſed, jointly with the biſhop, named proper arbitrators to determine what he ought to have given to the church, in caſe he had made a will. But the parliament, in 1409, redreſſed this grievance [t].

IT was antiently uſual in this kingdom to bring the mortuary to church along with the corpſe when it came to be buried; and thence [u] it is ſometimes called a *corſe-preſent*: a term, which beſpeaks it to have been once a voluntary donation.

p Co. Litt. 185.
q *Provinc. l.* 1. *tit.* 3.
r c. 13.
s Panormitan. *ad Decretal. l.* 3. *t.* 20. *c.* 32.
t Sp. L. b. 28. c. 41.
u Selden. Hiſt. of tithes. c. 10.

tion. However in Bracton's time, so early as Henry III. we find it rivetted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem* "*debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de alia* "*meliori*:" the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil:* "*et ideo consideranda est consuetudo loci* [w]." This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2. c. 6. And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring [x]. But by statute 28 Geo. 2. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in it's room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature: though sir Edward Coke [y] apprehends, that this is *a duty due upon death* and not a *mortuary*: a distinction which seems to be without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowleged mortuary, puts the matter out of dispute. The king, according to the record vouched by sir Edward Coke, is entitled to six things; the bishop's best horse or palfrey, with his furniture: his cloak,

w Bracton. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57.
x Cro. Car. 237.
y 2 Inst. 491.

or

or gown, and tippet: his cup and cover: his bason and ewer: his gold ring: and laftly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter [z].

THIS variety of cuftoms, with regard to mortuaries, giving frequently a handle to exactions on the one fide, and frauds or expenfive litigations on the other; it was thought proper by ftatute 21 Hen. VIII. c. 6. to reduce them to fome kind of certainty. For this purpofe it is enacted, that all mortuaries, or corfe-prefents to parfons of any parifh, fhall be taken in the following manner; unlefs where by cuftom lefs or none at all is due: *viz.* for every perfon who does not leave goods to the value of ten marks, nothing: for every perfon who leaves goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.* if above thirty pounds, and under forty pounds, 6*s.* 8*d.* if above forty pounds, of what value foever they may be, 10*s.* and no more. And no mortuary fhall throughout the kingdom be paid for the death of any feme-covert; nor for any child; nor for any one of full age, that is not a houfekeeper; nor for any wayfaring man; but fuch wayfaring man's mortuary fhall be paid in the parifh to which he belongs. And upon this ftatute ftands the law of mortuaries to this day.

3. HEIR-LOOMS are fuch goods and perfonal chattels, as, contrary to the nature of chattels, fhall go by fpecial cuftom to the heir along with the inheritance, and not to the executor of the laft proprietor. The termination, *loom*, is of Saxon original; in which language it fignifies a limb or member [a]; fo that an heir-loom is nothing elfe, but a limb or member of the inheritance. They are generally fuch things as cannot be taken away without damaging or difmembering the freehold: otherwife the general rule is, that no chattel intereft whatfoever fhall go to the heir, notwithftanding it be exprefsly limited to a man and his heirs, but fhall veft in the executor [b]. But deer in a real authorized park, fifhes in a

[z] pag. 413.
[a] Spelm. *Gloff.* 277.
[b] Co. Litt. 388.

pond,

pond, doves in a dove-houſe, &c. though in themſelves perſonal chattels, yet they are ſo annexed to and ſo neceſſary to the well-being of the inheritance, that they ſhall accompany the land wherever it veſts, by either deſcent or purchaſe [c]. For this reaſon alſo I apprehend it is, that the antient jewels of the crown are held to be heir-looms [d]; for they are neceſſary to maintain the ſtate, and ſupport the dignity, of the ſovereign for the time being. Charters likewiſe, and deeds, court-rolls, and other evidences of the land, together with the cheſts in which they are contained, ſhall paſs together with the land to the heir, in the nature of heir-looms, and ſhall not go to the executor [e]. By ſpecial cuſtom alſo, in ſome places, carriages, utenſils, and other houſehold implements, may be heir-looms [f]; but ſuch cuſtom muſt be ſtrictly proved. On the other hand, by almoſt general cuſtom, whatever is ſtrongly affixed to the freehold or inheritance, and cannot be ſevered from thence without violence or damage, "*quod ab aedibus non facile revellitur* [g]," is become a member of the inheritance, and ſhall thereupon paſs to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like [h]. A very ſimilar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among thoſe of the immoveable kind, calling them by a very particular appellation, *praedia volantia*, or volatile eſtates: ſuch as beds, tables, and other heavy implements of furniture, which (as an author of their own obſerves) "*dignitatem iſtam nacta ſunt, ut villis, ſylvis,* "*et aedibus, aliiſque praediis, comparentur; quod ſolidiora mo*-"*bilia ipſis aedibus ex deſtinatione patrisfamilias cohaerere vi*-"*deantur, et pro parte ipſarum aedium aeſtimentur* [i]."

OTHER perſonal chattels there are, which alſo deſcend to the heir in the nature of heir-looms, as a monument or tombſtone in a church, or the coat-armor of his anceſtor there

c Co. Litt. 8.
d *Ibid.* 18.
e Bro. *Abr. tit. chatteles.* 18.
f Co. Litt. 18. 185.
g Spelm. *Gloſſ.* 277.
h 12 Mod. 520.
i Stockmans *de jure devolutionis. c.* 3. §. 16.

hung

hung up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir [k]. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir [l]. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony [m]; for the property thereof remains in the executor, or whoever was at the charge of the funeral.

BUT to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void [n], even by a tenant in fee-simple. For, though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

[k] 12 Rep. 105. Co. Litt. 18.
[l] 3 Inst. 202. 12 Rep. 105.
[m] 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.
[n] Co. Litt. 185.

CHAPTER THE TWENTY-NINTH.

OF TITLE BY SUCCESSION, MARRIAGE AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies: and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate [a]. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists [b]. And thus a lease for years, an obliga-

[a] 4 Rep. 65.

[b] Bro. *Abr. t. estates.* 90. Cro. Eliz. 464.

tion,

tion, a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

BUT, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some antient cathedral, who stands in the place of, and represents in his corporate capacity, the chapter; such sole corporations as these have in this respect the same powers, as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative [c]. Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it [d]. For the word *successors*, when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs, but his executors; so if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the

[c] Dyer 48. Cro. Eliz. 464.

[d] Co. Litt. 46.

death

death of the present owner until the successor be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner [e]; but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never in suspence; nor in the other sole corporations before-mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go to or be acquired by them in right of succession [f].

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors [g]. The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successors, for the benefit of the orphan's fund [h]: but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is univer-

e Brownl. 132.
f Co. Litt. 46.
g *Ibid.* 90.
h 4 Rep. 65. Cro. Eliz. 682.

sally

fally inherent by the common law in all aggregate corporations, in the king, and in fuch fingle corporations as reprefent a number of perfons; and may, by fpecial cuftom, belong to certain other fole corporations for fome particular purpofes: although, generally, in fole corporations no fuch right can exift.

VI. A SIXTH method of acquiring property in goods and chattels is by *marriage;* whereby thofe chattels, which belonged formerly to the wife, are by act of law vefted in the hufband, with the fame degree of property and with the fame powers, as the wife, when fole, had over them.

THIS depends entirely on the notion of an unity of perfon between the hufband and wife; it being held that they are one perfon in law [i], fo that the very being and exiftence of the woman is fufpended during the coverture, or entirely merged or incorporated in that of the hufband. And hence it follows, that whatever perfonal property belonged to the wife, before marriage, is by marriage abfolutely vefted in the hufband. In a real eftate, he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her hufband, or to her heirs, if fhe dies before him; unlefs, by the birth of a child, he becomes tenant for life by the curtefy. But, in chattel interefts, the fole and abfolute property vefts in the hufband, to be difpofed of at his pleafure, if he chufes to take poffeffion of them: for, unlefs he reduces them to poffeffion, by exercifing fome act of ownerfhip upon them, no property vefts in him, but they fhall remain to the wife, or to her reprefentatives, after the coverture is determined.

THERE is therefore a very confiderable difference in the acquifition of this fpecies of property by the hufband, according to the fubject-matter; *viz.* whether it be a chattel *real,*

i See book I. c. 15.

or a chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture [k]: if he be outlawed or attainted, it shall be forfeited to the king [l]; it is liable to execution for his debts [m]: and, if he survives his wife, it is to all intents and purposes his own [n]. Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will [o]: for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her antient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them [p]. And so, if an estray comes into the wife's franchise, and the husband seises it, it is absolutely his property: but if he dies without seising it, his executors are not now at liberty to seise it, but the wife or her heirs [q]; for the husband never exerted the right he had, which right determined with the coverture. Thus in both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have

k Co. Litt. 46.
l Plowd. 263.
m Co. Litt. 351.
n *Ibid.* 300.
o Poph. 5. Co. Litt. 351.
p Co. Litt. 351.
q *Ibid.*

the

the *chattel real* by survivorship, but not the *chose in action* [r]; except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

THUS, and upon these reasons, stands the law between husband and wife, with regard to *chattels real*, and *choses in action*: but, as to *chattels personal* (or *choses*) *in possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representatives [s].

AND, as the husband may thus generally acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*;

[r] 3 Mod. 186.

[s] Co. Litt. 351.

which is a term borrowed from the civil law [t], and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; and therefore even the jewels of a peeress, usually worn by her, have been held to be *paraphernalia* [u]. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives [w]. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away [x]. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors where there is a deficiency of assets [y]. And her necessary apparel is protected even against the claim of creditors [z].

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action;* as if a man gives bond for 20*l.* or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract or agreement made; and the law only gives him a remedy to

t *Ff.* 23. 3. 9. §. 3.
u Moor. 213.
w Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
x Noy's Max. c. 49. Grahme v. Ld Londonderry. 24 Nov. 1746. Canc.
y 1 P. Wms. 730.
z Noy's Max. c. 49.

recover the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. SUCH penalties as are given by particular statutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500*l.* which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought [a]; for he that brings his action, and can *bona fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained [b]. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty [c]. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are

a 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. Tr. 3 Geo. III.

b Stat. 4 Hen. VII. c. 20.

c Cro. Eliz. 138. 11 Rep. 65.

not only the means of recovering, but alſo of acquiring, property. And what is ſaid of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any perſon that will ſue for the ſame. They are placed as it were in a ſtate of nature, acceſſible by all the king's ſubjects, but the acquired right of none of them: open therefore to the firſt occupant, who declares his intention to poſſeſs them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER ſpecies of property, that is acquired and loſt by ſuit and judgment at law, is that of *damages given to* a man by a jury, as a compenſation and ſatisfaction for ſome injury ſuſtained; as for a battery, for impriſonment, for ſlander, or for treſpaſs. Here the plaintiff has no certain demand till after verdict; but, when the jury has aſſeſſed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty ſhillings, he inſtantly acquires, and the defendant loſes at the ſame time, a right to that ſpecific ſum. It is true, that this is not an acquiſition ſo perfectly original as in the former inſtance: for here the injured party has unqueſtionably a vague and indeterminate right to ſome damages or other, the inſtant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this caſe ſo properly veſt a *new* title in him, as fix and aſcertain the *old* one; they do not *give*, but *define*, the right. But, however, though ſtrictly ſpeaking the primary right to a ſatisfaction for injuries is given by the law of nature, and the ſuit is only the means of aſcertaining and recovering that ſatisfaction; yet, as the legal proceedings are the only viſible means of this acquiſition of property, we may fairly enough rank ſuch damages, or ſatisfaction aſſeſſed, under the head of property acquired by ſuit and judgment at law.

3. HITHER

3. HITHER alſo may be referred, upon the ſame principle, all title to coſts and expenſes of ſuit; which are often arbitrary, and reſt entirely on the determination of the court, upon weighing all circumſtances, both as to the *quantum*, and alſo (in the courts of equity eſpecially, and upon motions in the courts of law) whether there ſhall be any coſts at all. Theſe coſts therefore, when given by the court to either party, may be looked upon as an acquiſition made by the judgment of law.

CHAPTER THE THIRTIETH.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. GIFTS then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

GRANTS

GRANTS or gifts, of chattels *perſonal*, are the act of transferring the right and the poſſeſſion of them; whereby one man renounces, and another man immediately acquires, all title and intereſt therein: which may be done either in writing, or by word of mouth [a] atteſted by ſufficient evidence, of which the delivery of poſſeſſion is the ſtrongeſt and moſt eſſential. But this conveyance, when merely voluntary, is ſomewhat ſuſpicious; and is uſually conſtrued to be fraudulent, if creditors or others become ſufferers thereby. And, particularly, by ſtatute 3 Hen. VII. c. 4. all deeds of gift of goods, made in truſt to the uſe of the donor, ſhall be void: becauſe otherwiſe perſons might be tempted to commit treaſon or felony, without danger of forfeiture; and the creditors of the donor might alſo be defrauded of their rights. And by ſtatute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others [b], ſhall be void as againſt ſuch perſons to whom ſuch fraud would be prejudicial; but, as againſt the grantor himſelf, ſhall ſtand good and effectual; and all perſons partakers in, or privy to, ſuch fraudulent grants, ſhall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and alſo on conviction ſhall ſuffer impriſonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of poſſeſſion, and takes effect immediately: as if A gives to B 100*l*, or a flock of ſheep, and puts him in poſſeſſion of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any conſideration or recompenſe [c]: unleſs it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, dureſs, or the like; or if he were drawn in, circumvented, or impoſed upon, by falſe pretences, ebriety, or ſurprize. But if the gift does not take effect, by delivery of immediate poſſeſſion, it is then not properly a gift, but a contract: and this a man

[a] Perk. §. 57.
[b] See 3 Rep. 82.
[c] Jenk. 109.

cannot be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division.

IX. A CONTRACT, which usually conveys an interest merely in action, is thus defined: "an agreement upon "sufficient consideration, to do or not to do a particular "thing." From which definition there arise three points to be contemplated in all contracts; 1. The *agreement*: 2. The *consideration*: and 3. The *thing* to be done or omitted, or the different species of contracts.

FIRST then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract: as where A contracts with B to pay him 100 *l*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the antient common law: for no *chose* in action could be assigned or granted over [d], because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a *chose* in action by assignment [e]: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession [f].

[d] Co. Litt. 214.

[e] Dyer. 30. Bro. *Abr. tit. chose in action.* 1 & 4.

[f] 3 P. Wms. 199.

THIS contract or agreement may be either expreſs or implied. *Expreſs* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a ſtated price for certain goods. *Implied* are ſuch as reaſon and juſtice dictate, and which therefore the law preſumes that every man undertakes to perform. As, if I employ a perſon to do any buſineſs for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deſerves. If I take up wares from a tradeſman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is alſo one ſpecies of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I ſhall pay the other party ſuch damages as he has ſuſtained by ſuch my neglect or refuſal. In ſhort, almoſt all the rights of perſonal property (when not in actual poſſeſſion) do in great meaſure depend upon contracts of one kind or other, or at leaſt might be reduced under ſome of them: which indeed is the method taken by the civil law; it having referred the greateſt part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quaſi ex contractu* [g].

A CONTRACT may alſo be either *executed*, as if A agrees to change horſes with B, and they do it immediately; in which caſe the poſſeſſion and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only veſts, and their reciprocal property in each other's horſe is not in poſſeſſion but in action; for a contract *executed* (which differs nothing from a grant) conveys a *choſe in poſſeſſion;* a contract *executory* conveys only a *choſe in action.*

HAVING thus ſhewn the general nature of a contract, we are, ſecondly, to proceed to the *conſideration* upon which it is founded; or the reaſon which moves the contracting party to

g *Inſt.* 3. 14. 2.

enter

enter into the contract. "It is an agreement, upon *sufficient* "*consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal [h]. This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen [i], is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another [j]. This consideration may sometimes however be set aside, and the contract become void, when it tends in it's consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

THESE valuable considerations are divided by the civilians [k] into four species. 1. *Do, ut des:* as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio, ut facias:* as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both sides;

h *In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. *l.* 2. §. 12.

i page 297.

j 3 Rep. 83.

k *Ff.* 19. 5. 5.

as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facio, ut des:* when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias:* which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det,* and *herus dat, ut servus faciat.*

A CONSIDERATION of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it [l]. As if one man promises to give another 100*l.* here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honour or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted [m] the maxim of the civil law [n], that *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum.* And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could

[l] Dr & St. d. 2. c. 24.

[m] Bro. *Abr. tit. dette.* 79. Salk. 129.

[n] *Cod.* 2. 3. 10. & 5. 14. 1.

be

be assigned [o], it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument [p], and every note from the subscription of the drawer [q], carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

WE are next to consider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing.*" The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1. SALE or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo* [r]. If it be a commutation of goods for goods, it is more properly an *exchange*; but, if it be a tranferring of goods for money, it is called a *sale*: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah [s]: though the practice of exchange still subsists among several of the savage nations. But, with regard to the *law* of

[o] Plowd. 308, 309.
[p] Hardr. 200. 1 Ch. Rep. 157.
[q] Lord Raym. 760.
[r] Noy's Max. c. 42.
[s] Gen. c. 23. v. 16.

sales

sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold.

WHERE the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whom ever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds [s], the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing, of the writ [t], and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasors*, though it still remains the same between the *parties*: and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors [v].

IF a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases [u]. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest* (which the civil law calls *arrha*, and interprets to be "*emptionis-venditi-*

[s] 29 Car. II. c. 3.
[t] 8 Rep. 171. 1 Mod. 188.
[v] Comb. 33. 12 Mod. 5. 7 Mod. 95.
[u] Hob. 41. Noy's Max. c. 42.

"*onis*

"*onis contractae argumentum* [w]," the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them [x]. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II. c. 3. no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10*l*, no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. Antiently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale*, "*venditio per mutuam manuum complexionem* [y];" till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on [z]. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l*, and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the

w *Inst.* 3 *tit.* 24.
x Noy. *ibid.*
y Stiernhook *de jure Goth.* *l.* 2. *c.* 5.
z Hob. 41.

contract,

contract, the property was in the vendee [a]. Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

BUT property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is [b], that all sales and contracts of any thing vendible, in fairs or markets *overt*, (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the mirroir informs us [c], were tolls established in markets, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses [d]. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day [e]. The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt [f]; but in London every shop in which goods are exposed publickly to sale, is market overt, for such things only as the owner professes to trade in [g]. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expresly provided by statute 1 Jac. I. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects)

[a] Noy. c. 42.
[b] 2 Inst. 713.
[c] *c.* 1. §. 3.
[d] *LL. Ethel.* 10. 12. *LL. Eadg.* Wilk. 80.
[e] Cro. Jac. 68.
[f] Godb. 131.
[g] 5 Rep. 83. 12 Mod. 521.

will in no case bind him; though it binds infants, feme coverts, idiots or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods [h]. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby [i]. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale [k]. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice [l]. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

BUT there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses [m]. For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market: that toll be paid, if any

h Bacon's use of the law. 158.

i 2 Inst. 713, 714.

k Perk. §. 93.

l 2 Inst. 713.

m *Ibid.* 719.

be

be due; and if not, one penny to the book-keeper, who ſhall enter down the price, colour, and marks of the horſe, with the names, additions, and abode of the vendee and vendor; the latter being properly atteſted. Nor ſhall ſuch ſale take away the property of the owner, if within ſix months after the horſe is ſtolen he puts in his claim before ſome magiſtrate, where the horſe ſhall be found; and, within forty days more, proves ſuch his property by the oath of two witneſſes, and tenders to the perſon in poſſeſſion ſuch price as he *bona fide* paid for him in market overt. But in caſe any one of the points before-mentioned be not obſerved, ſuch ſale is utterly void; and the owner ſhall not loſe his property, but at any diſtance of time may ſeize or bring an action for his horſe, wherever he happens to find him.

BY the civil law [n] an implied warranty was annexed to every ſale, in reſpect to the title of the vendor: and ſo too, in our law, a purchaſer of goods and chattels may have a ſatisfaction from the ſeller, if he ſells them as his own and the title proves deficient, without any expreſs warranty for that purpoſe [o]. But, with regard to the goodneſs of the wares ſo purchaſed, the vendor is not bound to anſwer; unleſs he expreſsly warrants them to be ſound and good [p], or unleſs he knew them to be otherwiſe and hath uſed any art to diſguiſe them [q], or unleſs they turn out to be different from what he repreſented to the buyer.

2. BAILMENT, from the French *bailler*, to deliver, is a delivery of goods in truſt, upon a contract expreſſed or implied, that the truſt ſhall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a ſuit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanly manner [r]. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the perſon appointed [s]. If a horſe, or other goods, be delivered to an inn-keeper or his ſervants, he is bound to keep

n *Ff*. 21. 2. 1.
o Cro. Jac. 474. 1 Roll. Abr. 90.
p F. N. B. 94.
q 2 Roll. Rep. 5.
r 1 Vern. 268.
s 12 Mod. 482.

them safely, and restore them when his guest leaves the house[t]. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner[u]. If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time[w]: for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24 (*a*). And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distreinors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise[x]; unless he expressly undertook[y] to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled[z], that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own[a].

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his con-

t Cro. Eliz. 622.
u Cro. Car. 271.
w Cro. Jac. 245. Yelv. 178.
x Co. Litt. 89.
y 4 Rep. 84.
z Lord Raym. 909. 12 Mod. 487.
a By the laws of Sweden the depositary of bailee of goods is not bound to restitution, in case of accident by fire or theft: provided his own goods perished in the same manner: "*jura enim nostra*," says Stiernhook, "*dolum praesumunt, si una non pereant.*" (*De jure Sueon. l. 2. c. 5.*)

(*a*) And further regulated by statute 29 Geo. III. c. 57.

tract

tract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The taylor, the carrier, the inn-keeper, the agisting farmer, the pawn-broker, the distreinor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person [b]. For, being responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

3. HIRING and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompence; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in case of hiring) entitled also to the price, for which the horse was hired [c].

[b] 13 Rep. 69.

[c] Yelv. 172. Cro. Jac. 236.

There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about it's legality *in foro conscientiae*. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle[d], that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of it's institution, which was only to serve the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law[e] has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it hath been observed, that the Mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger[f]: which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*; since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state

d *Polit. l.* 1. *c.* 10. This passage hath been suspected to be spurious.

e *Decretal. l.* 5. *tit.* 19.

f Deut. xxiii. 20.

may

may be well juſtified in permitting it to be turned to the purpoſes of profit, if the convenience of ſociety (the great end for which money was invented) ſhall require it. And that the allowance of moderate intereſt tends greatly to the benefit of the public, eſpecially in a trading country, will appear from that generally acknowleged principle, that commerce cannot ſubſiſt without mutual and extenſive credit. Unleſs money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few perſons would care to lend it; or at leaſt the eaſe of borrowing at a ſhort warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkiſh ſuperſtition and civil tyranny, when intereſt was laid under a total interdict, commerce was alſo at its loweſt ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itſelf it's inſeparable companion, the doctrine of loans upon intereſt. And, as to any ſcruples of conſcience, ſince all other conveniences of life may either be bought or hired, but money can only be hired, there ſeems to be no greater oppreſſion in taking a recompenſe or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conſcience, for the loan of a horſe, or the loan of a ſum of money: but a reaſonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his loſing it entirely, is not more immoral in one caſe than it is in the other. Indeed the abſolute prohibition of lending upon any, even moderate intereſt, introduces the very inconvenience which it ſeems meant to remedy. The neceſſity of individuals will make borrowing unavoidable. Without ſome profit allowed by law, there will be but few lenders: and thoſe principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themſelves from the danger of the penalty, by making that profit exorbitant. A capital diſ-

tinction muſt therefore be made between a moderate and exorbitant profit; to the former of which we uſually give the name of intereſt, to the latter the truly odious appellation of uſury: the former is neceſſary in every civil ſtate, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated ſociety. For, as the whole of this matter is well ſummed up by Grotius[s], "if the compenſation allowed by law does "not exceed the proportion of the hazard run, or the want felt, "by the loan, it's allowance is neither repugnant to the re-"vealed nor the natural law: but if it exceeds thoſe bounds, "it is then oppreſſive uſury; and though the municipal laws "may give it impunity, they never can make it juſt."

WE ſee, that the exorbitance or moderation of intereſt, for money lent, depends upon two circumſtances; the inconvenience of parting with it for the preſent, and the hazard of loſing it entirely. The inconvenience to individual lenders can never be eſtimated by laws; the rate therefore of general intereſt muſt depend upon the uſual or general inconvenience. This reſults entirely from the quantity of ſpecie or current money in the kingdom: for, the more ſpecie there is circulating in any nation, the greater ſuperfluity there will be, beyond what is neceſſary to carry on the buſineſs of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus neceſſary; which a perſon well ſkilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running caſh in his own ſhop: all above this neceſſary quantity may be ſpared, or lent, without much inconvenience to the reſpective lenders; and the greater this national ſuperfluity is, the more numerous will be the lenders, and the lower ought the rate of the national intereſt to be: but where there is not enough circulating caſh, or barely enough, to anſwer the ordinary uſes of the public, intereſt will be proportionably high; for lenders will be but few, as few can ſubmit to the inconvenience of lending.

[s] *de j. b. & p. l.* 2. *c.* 12. §. 22.

So

So alſo the hazard of an entire loſs has it's weight in the regulation of intereſt: hence, the better the ſecurity, the lower will the intereſt be; the rate of intereſt being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there ſhould be no intereſt but what is equivalent to the hazard, ſo, if there were no hazard, there ought to be no intereſt, ſave only what ariſes from the mere inconvenience of lending. Thus, if the quantity of ſpecie in a nation be ſuch, that the general inconvenience of lending for a year is computed to amount to *three per cent:* a man that has money by him will perhaps lend it upon good perſonal ſecurity at *five per cent.* allowing two for the hazard run; he will lend it upon landed ſecurity or mortgage at *four per cent.* the hazard being proportionably leſs; but he will lend it to the ſtate, on the maintenance of which all his property depends, at *three per cent.* the hazard being none at all.

BUT ſometimes the hazard may be greater, than the rate of intereſt allowed by law will compenſate. And this gives riſe to the practice of, 1. Bottomry, or *reſpondentia.* 2. Policies of inſurance. 3. Annuities upon lives.

AND firſt, *bottomry* (which originally aroſe from permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip in order to raiſe money to refit) is in the nature of a mortgage of a ſhip; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ſhip *(partem pro toto)* as a ſecurity for the repayment. In which caſe it is underſtood, that if the ſhip be loſt, the lender loſes alſo his whole money; but, if it returns in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt agreed upon, however it may exceed the legal rate of intereſt. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reaſon of the extraordinary hazard run by the lender [h].

[h] Moll. *de jur. mar.* 361. Malyne. *lex mercat.* b. 1. c. 31. Bacon's eſſays. c. 41. Cro. Jac. 208. Bynkerſh. *quaeſt jur. privat. l.* 3. *c.* 16.

And in this caſe the ſhip and tackle, if brought home, are anſwerable (as well as the perſon of the borrower) for the money lent. But if the loan is not upon the veſſel, but upon the goods and merchandize, which muſt neceſſarily be ſold or exchanged in the courſe of the voyage, then only the borrower, perſonally, is bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. Theſe terms are alſo applied to contracts for the repayment of money borrowed, not on the ſhip and goods only, but on the mere hazard of the voyage itſelf; when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary intereſt, in caſe ſuch a voyage be ſafely performed [i]: which kind of agreement is ſometimes called *foenus nauticum*, and ſometimes *uſura maritima* [j]. But as this gave an opening for uſurious and gaming contracts, eſpecially upon long voyages, it was enacted by the ſtatute 19 Geo. II. c. 37. that all monies lent on bottomry or at *reſpondentia*, on veſſels bound to or from the Eaſt Indies, ſhall be expreſsly lent only upon the ſhip or upon the merchandize; that the lender ſhall have the benefit of ſalvage [k]; and that if the borrower hath not an intereſt in the ſhip, or in the effects on board equal to the value of the ſum borrowed, he ſhall be reſponſible to the lender for ſo much of the principal as hath not been laid out, with legal intereſt and all other charges, though the ſhip and merchandize be totally loſt.

SECONDLY, a policy of *inſurance* is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or inſure him againſt a particular event. This is founded upon one of the ſame principles as the doctrine of intereſt upon loans, that of hazard; but not that of inconvenience. For if I inſure a ſhip to the Levant, and back again, at *five per cent*; here I calculate the chance that ſhe performs her voyage to be twenty to one againſt her being loſt: and, if ſhe be loſt, I loſe 100*l.* and get 5*l.* Now this is much the ſame as if I lend the merchant whoſe whole fortunes are embarked in this veſſel, 100*l.* at

i 1 Sid. 27.
j Molloy *ibid.* Malyne *ibid.*
k See Vol. I. page 294.

the rate of *eight per cent.* For by a loan I ſhould be immediately out of poſſeſſion of my money, the inconvenience of which we have ſuppoſed equal to *three per cent:* if therefore I had actually lent him 100 *l.* I muſt have added 3 *l.* on the ſcore of inconvenience, to the 5 *l.* allowed for the hazard, which together would have made 8 *l.* But, as upon an inſurance, I am never out of poſſeſſion of my money till the loſs actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (beſides the uſual rate of intereſt) for the borrower to have his life inſured till the time of repayment; for which he is loaded with an additional premium, ſuited to his age and conſtitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have ſeen, are equivalent to 5 *l.* which is therefore the legal intereſt: but there is alſo a ſpecial hazard in this caſe; for, if Sempronius dies within the year, Titius muſt loſe the whole of his 100*l.* Suppoſe this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reaſonable rate of intereſt in this caſe would be *fifteen per cent.* But this the law, to avoid abuſes, will not permit to be taken: Sempronius therefore gives Titius the lender only 5 *l.* the legal intereſt; but applies to Gaius an inſurer, and gives him the other 10*l.* to indemnify Titius againſt the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided againſt, which the eſtabliſhed rate of intereſt will not reach; that being calculated by the ſtate to anſwer only the ordinary and general hazard, together with the lender's inconvenience in parting with his ſpecie for the time. But, in order to prevent theſe inſurances from being turned into a miſchievous kind of gaming, it is enacted by ſtatute 14 Geo. III. c. 48. that no inſurance ſhall be made on lives, or on any other event, wherein the party inſured hath no intereſt; that in all policies the name of ſuch intereſted party ſhall be in-

ſerted;

serted; and nothing more shall be recovered thereon than the amount of the interest of the insured.

THIS doth not however extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these insurances hath of late years been greatly improved by a series of judicial decisions; which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence: but, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much however may be said; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest;* and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the statute 19 Geo. II. c. 37. that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all which had the same pernicious tendency) shall be totally null and void, except upon privateers, or upon ships or merchandize from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and lastly that, in the East India trade the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the

borrower

borrower ſhall (in caſe of a loſs) recover no more upon any inſurance than the ſurplus of his property, above the value of his bottomry or *reſpondentia* bond.

THIRDLY, the practice of purchaſing *annuities for lives* at a certain price or premium, inſtead of advancing the ſame ſum on an ordinary loan, ariſes uſually from the inability of the borrower to give the lender a permanent ſecurity for the return of the money borrowed, at any one period of time. He therefore ſtipulates (in effect) to repay annually, during his life, ſome part of the money borrowed; together with legal intereſt for ſo much of the principal as annually remains unpaid, and an additional compenſation for the extraordinary hazard run, of loſing that principal intirely by the contingency of the borrower's death: all which conſiderations, being calculated and blended together, will conſtitute the juſt proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency muſt depend on the age, conſtitution, ſituation, and conduct of the borrower; and therefore the price of ſuch annuities cannot without the utmoſt difficulty be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bona fide* (and not colourably [l]) put in jeopardy, no inequality of price will make it an uſurious bargain; though, under ſome circumſtances of impoſition, it may be relieved againſt in equity. To throw however ſome check upon improvident tranſactions of this kind, which are uſually carried on with great privacy, the ſtatute 17 Geo. III. c. 26. has directed, that upon the ſale of any life annuity of more than the value of ten pounds *per annum* (unleſs on a ſufficient pledge of lands in fee ſimple or ſtock in the public funds) the true conſideration, which ſhall be in money only, ſhall be ſet forth and deſcribed in the ſecurity itſelf; and a memorial of the date of the ſecurity, of the names of the parties, *ceſtuy que truſts*, *ceſtuy que vies*, and witneſſes, and of the conſideration money, ſhall within twenty days after it's execution be inrolled in the court of chancery; elſe the ſecurity ſhall be null and void: and, in caſe of colluſive practices reſpecting the con-

[l] Carth. 67.

ſideration,

ſideration, the court, in which any action is brought or judgment obtained upon ſuch colluſive ſecurity, may order the ſame to be cancelled, and the judgment (if any) to be vacated: and alſo all contracts for the purchaſe of annuities from infants ſhall remain utterly void, and be incapable of confirmation after ſuch infants arrive to the age of maturity. But to return to the doctrine of common intereſt on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have at different times eſtabliſhed different rates of intereſt. The Romans at one time allowed *centeſimae*, *one per cent.* monthly or *twelve per cent. per annum*, to be taken for common loans; but Juſtinian [m] reduced it to *trientes*, or one third of the *as* or *centeſimae*, that is, *four per cent*; but allowed higher intereſt to be taken of merchants, becauſe there the hazard was greater. So too Grotius in-

[m] *Cod.* 4. 32. 26. *Nov.* 33, 34, 35.——A ſhort explication of theſe terms, and of the diviſion of the Roman *as*, will be uſeful to the ſtudent, not only for underſtanding the civilians, but alſo the more claſſical writers, who perpetually refer to this diſtribution. Thus Horace, *ad Piſones*. 325.

Romani pueri longis rationibus aſſem
Diſcunt in partes centum *diducere. Dicat*
Filius Albini, ſi de quincunce *remota eſt*
Uncia, *quid ſuperat? poterat dixiſſe*, triens: *eu*,
Rem poteris ſervare tuam! redit uncia, *quid fit?*
Semis.——

It is therefore to be obſerved, that, in calculating the rate of intereſt, the Romans divided the principal ſum into an *hundred* parts; one of which they allowed to be taken monthly: and this, which was the higheſt rate of intereſt permitted, they called *uſurae centeſimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly uſed to expreſs any integral ſum, and was diviſable into twelve parts or *unciae*, therefore theſe twelve monthly payments or *unciae* were held to amount annually to one pound, or *as uſurarius*; and ſo the *uſurae aſſes* were ſynonymous to the *uſurae centeſimae*. And all lower rates of intereſt were denominated according to the relation they bore to this centeſimal uſury, or *uſurae aſſes*: for the ſeveral multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *ſextans*, *quadrans*, *triens*, *quincunx*, *ſemis*, *ſeptunx*, *bes*, *dodrans*, *dextans*, *deunx*, containing reſpectively, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciae* or duodecimal parts of an *as*. (*Ff.* 28. 5. 50. §. 2. Gravin. *orig. jur. civ. l.* 2. §. 47.) This being premiſed, the following table will clearly exhibit at once the ſubdiviſions of the *as*, and the denominations of the rate of intereſt.

USURAE.

forms us[n], that in Holland the rate of interest was then eight *per cent.* in common loans, but twelve to merchants. And lord Bacon was desirous of introducing a similar policy in England[o]: but our law establishes one standard for all alike, where the pledge of security itself is not put in jeopardy; lest, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten *per cent.* and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I. c. 17. reduced it to eight *per cent;* as did the statute 12 Car. II. c. 13. to six: and lastly by the statute 12 Ann. st. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made[p].

USURAE.	PARTES ASSIS.	PER ANNUM.
Asses, sive centesimae	integer	12 *per cent.*
Deunces	$\frac{11}{12}$	11
Dextantes, vel decunces	$\frac{5}{6}$	10
Dodrantes	$\frac{3}{4}$	9
Besses	$\frac{2}{3}$	8
Septunces	$\frac{7}{12}$	7
Semisses	$\frac{1}{2}$	6
Quincunces	$\frac{5}{12}$	5
Trientes	$\frac{1}{3}$	4
Quadrantes	$\frac{1}{4}$	3
Sextantes	$\frac{1}{6}$	2
Unciae	$\frac{1}{12}$	1

n *de jur. b. & p.* 2. 12. 22.

o Essays. c. 41.

p 1 Equ. Cas. abr. 289. 1 P. Wms. 395.

Thus

Thus Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even twelve *per cent*: for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to inforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III. c. 79. all mortgages and other securities upon estates, or other property in Ireland or the plantations, bearing interest not exceeding six *per cent.* shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

4. THE last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost[q]. This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisi-

[q] F. N. B. 119.

tion; being usually divided into debts of *record*, debts by *special*, and debts by *simple* contract.

A DEBT of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance are also a sum of money, recognized or acknowleged to be due to the crown or a subject, in the presence of some court or magistrate; with a condition that such acknowlegement shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes merchant and statutes staple, &c, if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

DEBTS by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowleged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then shewed that it is a creation or acknowlegement of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.

DEBTS by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes

 unsealed,

unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority.

BUT there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

A BILL *of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B who lives in England 1000*l*, now if C be going from England to Jamaica, he may pay B this 1000*l*, and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money

in

in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290 [r]; and in 1236 the use of paper credit was introduced into the Mogul empire in China [s]. In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee*.

THESE bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such [t], being by those statutes expresly enacted with regard to the other. So that now there is not in law any manner of difference between them.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also by the same statute 3 & 4 Ann. c. 9. are made assignable and indorsable in like manner as bills of exchange. But, by statute 15 Geo. III. c. 51. all promissory or other notes,

[r] 2 Carte. Hist. Engl. 203. 206.
[s] Mod. Un. Hist. iv. 499.
[t] 1 Roll. Abr. 6.

bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void: and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And by 17 Geo. III. c. 30. all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it (*c*).

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, *viz.* that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer [u]; in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit. It may therefore be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

IN the first place then the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to

[u] Stra. 1212.

(*c*) [By the statute of 23 Geo. 3. c. 49. explained and amended by statute 24 Geo. 3. sess. 1. c. 7. bills of exchange, promissory notes or other notes, drafts or orders under 50*l*, are to pay a stamp duty of 6 *d*, and, if 50*l*, or upwards, to pay 1 *s*.]

 another,

another, and so on *in infinitum*. And a promissory note, payable to A or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it [v]. But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing [w], he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowlegement that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20 *l*, or upwards, and expressed to be for value received, the payee or indorsee may protest it for *non-acceptance*: which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

BUT, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due, (which three days are called days of grace) the payee or indorsee is then to get it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law [x]) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such

[v] 2 Show. 235.—Grant v. Vaughan. T. 4 Geo. III. B. R.

[w] Stra. 1000.

[x] Lord Raym. 993.

neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee [y].

IF the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negociated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser has nobody to resort to, but the drawer only.

WHAT has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negociated from one hand to another: only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

[y] Salk. 127.

CHAPTER THE THIRTY-FIRST.

OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon [a], so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before [b] defined to be "a trader, who secretes himself, or does "certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender [c]; and in this spirit we are told by sir Edward Coke [d], that we have fetched as well the name, as the wickedness,

[a] See page 285.
[b] *Ibid.*
[c] Stat. 1 Jac. I. c. 15. §. 17.
[d] 4 Inst. 277.

of

of bankrupts from foreign nations [e]. But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted [f]. Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim* [g]: an oppression, which produced so many

[e] The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman (Dufresne. I. 969.) and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence, 34 Hen. VIII. c. 4. "against "such persons as do make bankrupt," is a literal translation of the French idiom, *qui font banque route*.

[f] Taylor. *Comment. in L. decemviral.* Bynkersh. *Observ. Jur. I.* 1. Heinecc. *Antiq. III.* 30. 4.

[g] In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch that

popular insurrections, and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the christian emperors; whereby, if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto*[h]." For, as the emperor justly observes[i], "*inhumanum erat spoliatum fortunis* "*suis in solidum damnari*." Thus far was just and reasonable: but, as the departing from one extreme is apt to produce it's opposite, we find it afterwards enacted[k], that if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or

that he may even violate with impunity the chastity of the debtor's wife: but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

h *Cod.* 7. 71. *per tot.*

i *Inst.* 4. 6. 40.

k *Nov.* 135. *c.* 1.

one

one in a liberal profeſſion, at the time of contracting his debts, has a ſufficient fund to pay them, the delay of payment is a ſpecies of diſhoneſty, and a temporary injuſtice to his creditor: and if, at ſuch time, he has no ſufficient fund, the diſhoneſty and injuſtice is the greater. He cannot therefore murmur, if he ſuffers the puniſhment which he has voluntarily drawn upon himſelf. But in mercantile tranſactions the caſe is far otherwiſe. Trade cannot be carried on without mutual credit on both ſides: the contracting of debts is therefore here not only juſtifiable, but neceſſary. And if by accidental calamities, as by the loſs of a ſhip in a tempeſt, the failure of brother traders, or by the non-payment of perſons out of trade, a merchant or trader becomes incapable of diſcharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of debtors, the law has given a compaſſionate remedy, but denied it to their faults: ſince, at the ſame time that it provides for the ſecurity of commerce, by enacting that every conſiderable trader may be declared a bankrupt, for the benefit of his creditors as well as himſelf, it has alſo (to diſcourage extravagance) declared, that no one ſhall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the ſtatutes, but only an *induſtrious* trader.

THE firſt ſtatute made concerning any Engliſh bankrupts, was 34 Hen. VIII. c. 4. when trade began firſt to be properly cultivated in England: which has been almoſt totally altered by ſtatute 13 Eliz. c. 7. whereby bankruptcy is confined to ſuch perſons only as have *uſed the trade of merchandize*, in groſs or by retail, by way of bargaining, exchange, rechange, bartering, cheviſance[l], or otherwiſe; or have *ſought their living by buying and ſelling*. And by ſtatute 21 Jac. I. c. 19. perſons uſing the trade or profeſſion of a *ſcrivener*, receiving other mens monies and eſtates into their truſt and cuſtody, are alſo made liable to the ſtatutes of bankruptcy: and the benefits, as well as the penal parts of the law, are ex-

[l] that is, making contracts. (Dufreſne. II. 569.)

tended

tended as well to *aliens* and *denizens* as to natural born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30. [m] *bankers*, *brokers*, and *factors*, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I. *viz.* for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandize of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act [n], no *farmer*, *grazier*, or *drover*, shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of it's produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents: wherefore also, upon a similar reason, a *receiver of the king's taxes* is not capable [o], as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute [p], no person shall have a commission of bankrupt awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l*; or of *two*, to whom he is indebted 150*l*; or of *more*, to whom all together he is indebted 200*l*. For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statute themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

m §. 39.
n §. 40.
o §. *eod.*
p §. 23.

IN the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelyhood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general word, a *chapman*, who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where therefore an extensive credit, for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as that of a husbandman, a gardener, and the like, who are paid for their work and labour [q]. Also an inn-keeper cannot, as such, be a bankrupt [r]: for his gain or livelyhood does not arise from buying and selling in the way of merchandize, but greatly from the use of his rooms and furniture, his attendance and the like: and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding house, and makes considerable gains by buying and selling what he spends in the house; and such a one is clearly not within the statutes [s]. But where persons buy goods, and make them up into saleable commodities, as shoe-makers, smiths, and the like; here, though part of the gain is by bodily labour, and not by buying and selling, yet they are within the statutes of bankrupts [t]: for the labour is only in melioration of the commodity, and rendering it more fit for sale.

ONE single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made [u]. Neither will buying and selling under particular restraints, or for particular purposes; as if

q Cro. Car. 31.
r Cro. Car. 549. Skinn. 291.
s Skinn. 292. 3 Mod. 330.
t Cro. Car. 31. Skinn. 292.
u 2 P. Wms. 308.

a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes [w]. An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to pay [x]. But a feme covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt [y].

2. HAVING thus considered, who may, and who may not be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. A bankrupt is a "trader, who secretes himself, nor does certain other acts, "tending to defraud his creditors." We have hitherto been employed in explaining the former part of this description, "a trader;" let us now attend to the latter, "who secretes "himself, or does certain other acts, tending to defraud his "creditors." And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon.

w 1 Salk. 110. Skinn. 292.

x Lord Raym. 443.

y *La Vie* v. *Philips*, M. 6 Geo. III. B. R.

Among

tirely on the ſeveral ſtatutes of bankruptcy; all which I ſhall endeavour to blend together, and digeſt into a conciſe methodical order.

AND, firſt, there muſt be a *petition* to the lord chancellor by one creditor to the amount of 100*l*, or by two to the amount of 150*l*, or by three or more to the amount of 200*l*; which debts muſt be proved by *affidavit*[n]: upon which he grants a *commiſſion* to ſuch diſcreet perſons as to him ſhall ſeem good, who are then ſtiled commiſſioners of bankrupt[o]. The petitioners, to prevent malicious applications, muſt be bound in a ſecurity of 200*l*, to make the party amends in caſe they do not prove him a bankrupt. And if on the other hand they receive any money or effects from the bankrupt, as a recompenſe for ſuing out the commiſſion, ſo as to receive more than their ratable dividends of the bankrupt's eſtate, they forfeit not only what they ſhall have ſo received, but their whole debt. Theſe proviſions are made, as well to ſecure perſons in good credit from being damnified by malicious petitions, as to prevent knaviſh combinations between the creditors and bankrupt, in order to obtain the benefit of a commiſſion. When the commiſſion is awarded and iſſued, the commiſſioners are to meet, at their own expenſe, and to take an oath for the due execution of their commiſſion, and to be allowed a ſum not exceeding 20*s*, *per diem* each, at every ſitting. And no commiſſion of bankrupt ſhall abate, or be void, upon any demiſe of the crown[p].

WHEN the commiſſioners have received their commiſſion, they are firſt to receive proof of the perſon's being a trader, and having committed ſome act of bankruptcy; and then to declare him a bankrupt, if proved ſo; and to give notice thereof in the gazette, and at the ſame time to appoint three meetings. At one of theſe meetings an election muſt be made of aſſignees, or perſons to whom the bankrupt's eſtate ſhall be aſſigned, and in whom it ſhall be veſted for the benefit of the creditors; and aſſignees are to be choſen by the major

n Stat. 5 Geo. 2. c. 30.
o 3 Stat. 13 Eliz. c. 7.
p Stat. 5 Geo. 2. c. 30.

part,

part, in value, of the creditors who ſhall then have proved their debts; but may be originally appointed by the commiſſioners, and afterwards approved or rejected by the creditors: but no creditor ſhall be admitted to vote in the choice of aſſignees, whoſe debt on the ballance of accounts does not amount to 10*l.* And at the third meeting, at fartheſt, which muſt be on the forty-ſecond day after the advertiſement in the gazette, (unleſs the time be enlarged by the lord chancellor) the bankrupt, upon notice alſo perſonally ſerved upon him or left at his uſual place of abode, muſt ſurrender himſelf perſonally to the commiſſioners; which ſurrender (if voluntary) protects him from all arreſts till his final examination is paſt: and he muſt thenceforth in all reſpects conform to the directions of the ſtatutes of bankruptcy; or, in default of either ſurrender or conformity, ſhall be guilty of felony without benefit of clergy, and ſhall ſuffer death, and his goods and eſtate ſhall be diſtributed among his creditors [q].

IN caſe the bankrupt abſconds, or is likely to run away, between the time of the commiſſion iſſued, and the laſt day of ſurrender, he may by warrant from any judge or juſtice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commiſſioners; who are alſo empowered immediately to grant a warrant for ſeiſing his goods and papers [r].

WHEN the bankrupt appears, the commiſſioners are to examine him touching all matters relating to his trade and effects. They may alſo ſummon before them, and examine, the bankrupt's wife [s] and any other perſon whatſoever, as to all matters relating to the bankrupt's affairs. And in caſe any of them ſhall refuſe to anſwer, or ſhall not anſwer fully, to any lawful queſtion, or ſhall refuſe to ſubſcribe ſuch their examination, the commiſſioners may commit them to priſon without bail, till they ſubmit themſelves and make and ſign a full anſwer; the commiſſioners ſpecifying in their warrant of commitment the queſtion ſo refuſed to be anſwered. And any gaoler, permitting ſuch perſon to eſcape, or go out of priſon, ſhall forfeit 500*l.* to the creditors [t].

q Stat. 5 Geo. II. c. 30.
r *Ibid.*
s Stat. 21 Jac. I. c. 19.
t Stat. 5 Geo. II. c. 30.

THE bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and his children) or, in case he conceals or embezzles any effects to the amount of 20*l.* or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors [u]. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off [v].

AFTER the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such farther reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors [w].

HITHERTO every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt) and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20*l.*) will sign a certificate to that purport; the commissioners are then

u Stat. 5 Geo. II. c. 30. By the laws of Naples all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death: also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

v Stat. 21 Jac. I. c. 19.

w Stat. 5 Geo. II. c. 30.

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to authenticate ſuch certificate under their hands and ſeals, and to tranſmit it to the lord chancellor: and he, or two of the judges whom he ſhall appoint, on oath made by the bankrupt that ſuch certificate was obtained without fraud, may allow the ſame; or diſallow it, upon cauſe ſhewn by any of the creditors of the bankrupt [x].

IF no cauſe be ſhewn to the contrary, the certificate is allowed of courſe; and then the bankrupt is entitled to a decent and reaſonable allowance out of his effects, for his future ſupport and maintenance, and to put him in a way of honeſt induſtry. This allowance is alſo in proportion to his former good behaviour, in the early diſcovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten ſhillings in the pound, he is left to the diſcretion of the commiſſioners and aſſignees, to have a competent ſum allowed him, not exceeding *three per cent;* but if they pay ten ſhillings in the pound, he is to be allowed *five per cent;* if twelve ſhillings and ſix-pence, then *ſeven and a half per cent;* and if fifteen ſhillings in the pound, then the bankrupt ſhall be allowed *ten per cent:* provided, that ſuch allowance do not in the firſt caſe exceed 200*l.* in the ſecond 250*l.* and in the third 300*l.* [y].

BESIDES this allowance, he has alſo an indemnity granted him, of being free and diſcharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment ſhall have been obtained againſt him, and he lies in priſon upon execution for ſuch debts; and, for that among other purpoſes, all proceedings on commiſſions of bankrupt are, on petition, to be entered of record, as a perpetual bar againſt actions to be commenced on this account: though, in general, the production of the certificate properly allowed

x Stat. 5 Geo. II. c. 30.

y *Ibid.* By the Roman law of ceſſion, if the debtor acquired any conſiderable property ſubſequent to the giving up of his all, it was liable to the demands of his creditors (*Ff.* 42. 3, 4.) But this did not extend to ſuch allowance as was left to him on the ſcore of compaſſion for the maintenance of himſelf and family. *Si quid miſericordiae cauſa ei fuerit relictum, puta menſtruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus eſt alimentis cottidianis.* (*Ibid. l.* 6.)

ſhall be ſufficient evidence of all previous proceedings [z]. Thus the bankrupt becomes a clear man again; and, by the aſſiſtance of his allowance and his own induſtry, may become a uſeful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to theſe benefits, unleſs his failures have been owing to misfortunes, rather than to miſconduct and extravagance.

FOR no allowance or indemnity ſhall be given to a bankrupt, unleſs his certificate be ſigned and allowed, as beforementioned; and alſo, if any creditor produces a fictitious debt, and the bankrupt does not make diſcovery of it, but ſuffers the fair creditors to be impoſed upon, he loſes all title to theſe advantages [a]. Neither can he claim them, if he has given with any of his children above 100 *l.* for a marriage portion, unleſs he had at that time ſufficient left to pay all his debts; or if he has loſt at any one time 5 *l.* or in the whole 100 *l.* within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatſoever; or, within the ſame time has loſt to the value of 100 *l.* by ſtockjobbing. Alſo to prevent the too common practice of frequent and fraudulent or careleſs breaking, a mark is ſet upon ſuch as have been once cleared by a commiſſion of bankrupt, or have compounded with their creditors, or have been delivered by an act of inſolvency: which is an occaſional act, frequently paſſed by the legiſlature: whereby all perſons whatſoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile ſtate of life are not included within the laws of bankruptcy, are diſcharged from all ſuits and impriſonment, upon delivering up all their eſtate and effects to their creditors upon oath, at the ſeſſions or aſſizes; in which caſe their perjury or fraud is uſually, as in caſe of bankrupts, puniſhed with death. Perſons who have been once cleared by any of theſe methods, and afterwards become bankrupts again, unleſs they pay full fifteen ſhillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future eſtate they ſhall acquire remains liable to their creditors, excepting their neceſ-

[z] Stat. 5 Geo. II. c. 30.

[a] Stat. 24 Geo. II. c. 57.

ſary apparel, houſehold goods, and the tools and implements of their trades [b].

THUS much for the proceedings on a commiſſion of bankrupt, ſo far as they affect the bankrupt himſelf perſonally. Let us next conſider,

4. How ſuch proceedings affect or transfer the *eſtate* and *property* of the bankrupt. The method whereby a *real* eſtate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was ſhewn under it's proper head in a former chapter [c]. At preſent therefore we are only to conſider the transfer of things *perſonal* by this operation of law.

BY virtue of the ſtatutes before-mentioned [d] all the perſonal eſtate and effects of the bankrupt are conſidered as veſted, by the act of bankruptcy, in the future aſſignees of his commiſſioners, whether they be goods in actual *poſſeſſion*, or debts, contracts, and other choſes in *action*; and the commiſſioners by their warrant may cauſe any houſe or tenement of the bankrupt to be broke open, in order to enter upon and ſeiſe the ſame. And when the aſſignees are choſen or approved by the creditors, the commiſſioners are to aſſign every thing over to them; and the property of every part of the eſtate is thereby as fully veſted in them, as it was in the bankrupt himſelf, and they have the ſame remedies to recover it [e].

THE property veſted in the aſſignees is the whole that the bankrupt had in himſelf, at the time he committed the firſt act of bankruptcy, or that has been veſted in him ſince, before his debts are ſatisfied or agreed for. Therefore it is uſually ſaid, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any ſubſequent conduct, as a dubious equivocal act may be [f]; but that, if a commiſſion is afterwards awarded, the commiſſion and the property of the aſſignees ſhall have a relation, or re-

b Stat. 5 Geo II. c. 30.
c page 285.
d Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.
e 12 Mod. 324.
f Salk. 110.

ference, back to the first and original act of bankruptcy[g]. Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts[h]; for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby[i]. In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void[k]. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to it's utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a *bona fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the gazette[l].

g 4 Burr. 32.
h 1 Atk. 262.
i Viner. Abr. t. creditor and bankr. 104.
k Sp. L. b. 29. c. 16.
l Stat. 5 Geo. II. c. 30.

When

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the commission issued, give one and twenty days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption [m]. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14. (which directs, that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it hath also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, *even though he hath neglected to distrein* (*a*), *while the goods remained on the premises;* which he is otherwise entitled to do for his entire rent, be the *quantum* what it may [n].

[m] Finch. Rep. 466. [n] 1 Atk. 103, 104.

(*a*) But this was held to be a mistake by lord chancellor Bathurst, *in ex parte* Devisme, 13th January 1776, where the general question was, whether a landlord is intitled to have a year's rent paid him out of the effects of a bankrupt tenant, such effects having been seized under the commission and removed by the commissioners' messenger from the demised premises, in respect whereof the rent was in arrear. The lord chancellor was clearly of opinion, upon the authority of two cases in Atkyns's Reports, viz. *ex parte* Butler, assignee of Richardson, and *ex parte* Plummer, that the landlord could only come in as a common creditor. That the passage in Mr. justice Blackstone's Commentaries (2 Black. 487.) was a mistake. He said, if the legislature had intended to prefer the landlord, they would have done so, as they do in the insolvent debtors acts. (*Vid.* also Bradyl *v.* Ball, 1 Brown Cas. in Chanc. 427.)

But, otherwife, judgments and recognizances, (both which are debts of record, and therefore at other times have a priority) and alfo bonds and obligations by deed or fpecial inftrument, (which are called debts by fpecialty, and are ufually the next in order) thefe are all put on a level with debts by mere fimple contract, and all paid *pari paffu* [o]. Nay, fo far is this matter carried, that, by the exprefs provifion of the ftatutes [p], debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, fhall be proved and paid equally with the reft [q], allowing a difcount or drawback in proportion. And infurances, and obligations upon bottomry or *refpondentia*, *bona fide* made by the bankrupt, though forfeited after the commiffion is awarded, fhall be looked upon in the fame light as debts contracted before any act of bankruptcy [r].

WITHIN eighteen months after the commiffion iffued, a fecond and final dividend fhall be made, unlefs all the effects were exhaufted by the firft [s]. And if any furplus remains, after felling his eftates and paying every creditor his full debt, it fhall be reftored to the bankrupt [t]. This is a cafe which fometimes happens to men in trade, who involuntarily, or at leaft unwarily commit acts of bankruptcy, by abfconding and the like, while their effects are more than fufficient to pay their creditors. And, if any fufpicious or malevolent creditor will take the advantage of fuch acts, and fue out a commiffion, the bankrupt has no remedy, but muft quietly fubmit to the effects of his own imprudence; except that, upon fatisfaction made to all the creditors, the commiffion may be *fuperfeded* [u]. This cafe may alfo happen, when a knave is defirous of defrauding his creditors, and is compelled by a commiffion to do them that juftice, which otherwife he wanted to evade. And therefore, though the ufual rule is, that all intereft on debts carrying intereft fhall ceafe from the time of iffuing the commiffion, yet, in cafe of a furplus left after payment of every debt, fuch intereft fhall again revive, and be chargeable on the bankrupt [w], or his reprefentatives.

o Stat. 21 Jac. c. 19.
p Stat. 7 Geo. I. c. 31.
q Lord Raym. 1549. Stra. 1211.
r Stat. 19 Geo. II. c. 32.
s Stat. 5 Geo. II. c. 30.
t Stat. 13 Eliz. c. 7.
u 2 Ch. Caf. 144.
w 1 Atk. 244.

CHAPTER THE THIRTY-SECOND.

OF TITLE BY TESTAMENT, AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, *viz.* by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI, XII. IN the pursuit then of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and it's incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

FIRST, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts,

gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons [a]. The former method of acquiring personal property, according to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law [b], we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato*, and which answers to the descent or inheritance of real estates.

TESTAMENTS are of very high antiquity. We find them in use among the antient Hebrews; though I hardly think the example usually given [c], of Abraham's complaining [d] that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by *will*. And indeed a learned writer [e] has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law [f]. But, (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world [g]) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings [h], wherein Jacob bequeaths to his son Joseph a portion of his inheritance

a Puff. L. of N. b. 4. c. 10.

b *Ibid. b.* 4. c. 11.

c Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1.

d Gen. c. 15.

e Taylor's elem. civ. law. 517.

f See pag. 12.

g Selden. *de succ. Ebr. c.* 24.

h Gen. c. 48.

heritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens [i]; but in many other parts of Greece they were totally discountenanced [k]. In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing [l]: and, among the northern nations, particularly among the Germans [m], testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state [n]; which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven [o].

WITH us in England this power of bequeathing is co-eval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive* "*morte repentina, fuerit intestatus mortuus, dominus tamen nul-* "*lam rerum suarum partem (praeter eam quae jure debetur he-* "*reoti nomine) sibi assumito. Verum possessiones uxori, liberis,* "*et cognatione proximis, pro suo cuique jure, distribuantur* [p]." But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us [q], that by the common law,

i Plutarch. *in vita Solon.*

k Pott. Antiq. l. 4. c. 15.

l *Inst.* 2. 22. 1.

m Tacit. *de mor. Germ.* 21.

n See pag. 13.

o Sp. L. b. 27. c. 1. Vinnius *in Inst. l.* 2. *tit.* 10.

p *LL. Canut.* c. 68.

q *l.* 2. *c.* 5.

as it ſtood in the reign of Henry the ſecond, a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal deſcendants, another to his wife, and the third was at his own diſpoſal: or, if he died without a wife, he might then diſpoſe of one moiety, and the other went to his children; and ſo *e converſo*, if he had no children the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or iſſue, the whole was at his own diſpoſal [r]. The ſhares of the wife and children were called their *reaſonable* parts; and the writ *de rationabili parte bonorum* was given to recover them [s].

THIS continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts ſhall firſt of all be levied, and then the reſidue of the goods ſhall go to the executor to perform the will of the deceaſed: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; "ſalvis uxori ipſius et pueris ſuis rationabilibus partibus ſuis* [t]." In the reign of king Edward the third this right of the wife and children was ſtill held to be the univerſal or common law [u]; though frequently pleaded as the local cuſtom of Berks, Devon, and other counties [w]: and ſir Henry Finch lays it down expreſsly [x], in the reign of Charles the firſt, to be the general law of the land. But this law is at preſent altered by imperceptible degrees, and the deceaſed may now by will bequeath the whole of his goods and chattels; though we cannot trace out when firſt this alteration began. Indeed ſir Edward Coke [y] is of opinion, that this never was

r Bracton. *l.* 2. c. 26. Flet. *l.* 2. *c.* 57.

s F. N. B. 122.

t 9 Hen. III. c. 18.

u A widow brought an action of detinue againſt her huſband's executors, *quod cum per conſuetudinem totius regni Angliae hactenus uſitatum et approbatum, uxores debent et ſolent a tempore, &c, habere ſuam rationabilem partem bonorum maritorum ſuorum: ita videlicet, quod ſi nullos habuerint liberos, tunc medietatem; et, ſi habuerint, tunc tertiam partem, &c*; and that her huſband died worth 200,000 marks, without iſſue had between them; and thereupon ſhe claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the huſband's dying without iſſue was denied; but the rule of law, as ſtated in the writ, ſeems to have been univerſally allowed. (*M.* 30 *Edw. III.* 25.) And a ſimilar caſe occurs in *H.* 17 *Edw. III.* 9.

w *Reg. Brev.* 142. Co. Litt. 176.

x Law. 175.

y 2 Inſt. 33.

the

the general law, but only obtained in particular places by ſpecial cuſtom: and to eſtabliſh that doctrine, he relies on a paſſage in Bracton, which, in truth, when compared with the context, makes directly againſt his opinion. For Bracton [z] lays down the doctrine of the reaſonable part to be the common law; but mentions that as a particular exception, which ſir Edward Coke has haſtily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which alſo continues to this day to be the general law of our ſiſter kingdom of Scotland [a]. To which we may add, that, whatever may have been the cuſtom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in uſe in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the ſame ſtandard, three ſtatutes have been provided; the one 4 & 5 W. & M. c. 2. explained by 2 and 3 Ann. c. 5. for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that perſons within thoſe diſtricts, and liable to thoſe cuſtoms, may (if they think proper) diſpoſe of *all* their perſonal eſtates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly aboliſhed throughout all the kingdom of England, and a man may deviſe the whole of his chattels as freely, as he formerly could his third part or moiety. In diſpoſing of which, he was bound by the cuſtom of many places (as was ſtated in a former chapter [b]) to remember his lord and the church, by leaving them his two beſt chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleaſed.

z *l.* 2. *c.* 26. §. 2.
a Dalrymp. of feud. property. 145.
b pag. 426.

In

IN case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seise upon his goods, as the *parens patriae*, and general trustee of the kingdom [c]. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition [d]. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins [e], because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowlege what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seise them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money in *pios usus*: and, if he did otherwise, he broke the confidence which the law reposed in him [f]. So that properly the whole interest and power, which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious [g]. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

c 9 Rep. 38.
d *Ibid.* 37.
e §. 486.
f Finch. Law. 173, 174.
g Plowd. 277.

THE

THE goods of the inteſtate being thus veſted in the ordinary upon the moſt ſolemn and conſcientious truſt, the reverend prelates were therefore not accountable to any, but to God and themſelves, for their conduct [h]. But even in Fleta's time it was complained [i], "*quod ordinarii, hujuſmodi bona* "*nomine eccleſiae occupantes, nullam vel ſaltem indebitam faciunt* "*diſtributionem.*" And to what a length of iniquity this abuſe was carried, moſt evidently appears from a gloſs of pope Innocent IV [k], written about the year 1250; wherein he lays it down for eſtabliſhed canon law, that "*in Britannia* "*tertia pars bonorum decedentium ab inteſtato in opus eccleſiae et* "*pauperum diſpenſanda eſt.*" Thus the popiſh clergy took to themſelves [l] (under the name of the church and poor) the whole reſidue of the deceaſed's eſtate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reaſon it was enacted by the ſtatute of Weſtm. 2. [m] that the ordinary ſhall be bound to pay the debts of the inteſtate ſo far as his goods will extend, in the ſame manner that executors were bound in caſe the deceaſed had left a will: a uſe more truly pious, than any *requiem*, or maſs for his ſoul. This was the firſt check given to that exorbitant power, which the law had entruſted with ordinaries. But, though they were now made liable to the creditors of the inteſtate for their juſt and lawful demands: yet the *reſiduum*, after payment of debts, remained ſtill in their hands, to be applied to whatever purpoſes the conſcience of the ordinary ſhould approve. The flagrant abuſes of which power occaſioned the legiſlature again to interpoſe, in order to prevent the ordinaries from keeping any longer the adminiſtration in their own hands, or thoſe of their immediate de-

h Plowd. 277.

i *l.* 2. *c.* 57. §. 10.

k *in Decretal. l.* 5. *t.* 3. *c.* 42.

l The proportion given to the prieſt, and to other pious uſes, was different in different countries. In the archdeaconry of Richmond in Yorkſhire, this proportion was ſettled by a papal bulle, *A. D.* 1254. (*Regiſt. honoris de Richm.* 101.) and was obſerved till aboliſhed by the ſtatute 26 Hen. VIII. c. 15.

m 13 Edw. I. c. 19.

pendents: and therefore the ſtatute 31 Edw. III. c. 11. provides, that, in caſe of inteſtacy, the ordinary ſhall depute the neareſt and moſt lawful friends of the deceaſed to adminiſter his goods; which adminiſtrators are put upon the ſame footing, with regard to ſuits and to accounting, as executors appointed by will. This is the original of adminiſtrators, as they at preſent ſtand; who are only the officers of the ordinary, appointed by him in purſuance of this ſtatute, which ſingles out the *next and moſt lawful friend* of the inteſtate; who is interpreted [n] to be the *next of blood* that is under no legal diſabilities. The ſtatute 21 Hen. VIII. c. 5. enlarges a little more the power of the eccleſiaſtical judge; and permits him to grant adminiſtration *either* to the widow, *or* the next of kin, *or* to both of them, at his own diſcretion; and where two or more perſons are in the ſame degree of kindred, gives the ordinary his election to accept whichever he pleaſes.

UPON this footing ſtands the general law of adminiſtrations at this day. I ſhall, in the farther progreſs of this chapter, mention a few more particulars, with regard to who may, and who may not, be adminiſtrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only ſerving to ſhew the original and gradual progreſs of teſtaments and adminiſtrations; in what manner the latter was firſt of all veſted in the biſhops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular perſons nominated expreſsly by the law.

I PROCEED now, *ſecondly*, to inquire who may, or may not, make a teſtament; or what perſons are abſolutely obliged by law to die inteſtate. And this law [o] is entirely prohibitory; for, regularly, every perſon hath full power and liberty to make a will, that is not under ſome ſpecial prohibition by law or cuſtom: which prohibitions are principally upon three

[n] 9 Rep. 39.

[o] Godolph. Orph. Leg. *p.* 1. *c.* 7.

accounts;

accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

1. IN the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law[p]. For, though some of our common lawyers have held that an infant of any age (even four years old) might make a testament[q], and others have denied that under eighteen he is capable[r], yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the testator was not of sufficient discretion, whether at the age of fourteen or four and twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.

2. SUCH persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like[s]. But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole[t]. But with us a

p Godolph. p. 1. c 8. Wentw. 212. 2 Vern. 104. 469. Gilb. Rep. 74.
q Perkins. §. 503.
r Co. Litt. 89.
s Godolph. p. 1. c. 9.
t *Ff.* 31. 1. 77.

married woman is not only utterly incapable of deviſing *lands*, being excepted out of the ſtatute of wills, 34 & 35 Hen. VIII. c. 5. but alſo ſhe is incapable of making a teſtament of *chattels*, without the licence of her huſband. For all her perſonal chattels are abſolutely his; and he may diſpoſe of her chattels real, or ſhall have them to himſelf if he ſurvives her: it would be therefore extremely inconſiſtent, to give her a power of defeating that proviſion of the law, by bequeathing thoſe chattels to another [v]. Yet by her huſband's licence ſhe may make a teſtament [u]; and the huſband, upon marriage, frequently covenants with her friends to allow her that licence: but ſuch licence is more properly his aſſent; for, unleſs it be given to the particular will in queſtion, it will not be a complete teſtament, even though the huſband beforehand hath given her permiſſion to make a will [w]. Yet it ſhall be ſufficient to repel the huſband from his general right of adminiſtering his wife's effects; and adminiſtration ſhall be granted to her appointee, with ſuch teſtamentary paper annexed [x]. So that in reality the woman makes no will at all, but only ſomething like a will [y]; operating in the nature of an appointment, the execution of which the huſband by his bond, agreement, or covenant, is bound to allow. A diſtinction ſimilar to which we meet with in the civil law. For, though a ſon who was *in poteſtate parentis* could not by any means make a formal and legal teſtament, even though his father permitted it [z], yet he might, with the like permiſſion of his father, make what was called a *donatio mortis cauſa* [a]. The queen conſort is an exception to this general rule, for ſhe may diſpoſe of her chattels by will, without the conſent of her lord [b]: and any feme-covert may make her will of goods, which are in her poſſeſſion *in auter droit*, as executrix or adminiſtratrix; for theſe can never be the property of the huſband [c]: and, if ſhe has any pinmoney or ſeparate maintenance, it is ſaid ſhe may diſpoſe of her ſavings thereout by

v 4 Rep. 51.
u Dr & St. d. 1. c. 7.
w Bro. *Abr. tit. deviſe.* 34. Stra. 891.
x *Tucking v. Betteſworth.* T. 13 Geo. II. B. R.
y Cro. Car. 376. 1 Mod. 211.
z *Ff.* 28. 1. 6.
a *Ff.* 39. 6. 25.
b Co. Litt. 133.
c Godolph. 1. 10.

teſtament,

teſtament, without the control of her huſband[d]. But, if a feme-ſole makes her will, and afterwards marries, ſuch ſubſequent marriage is eſteemed a revocation in law, and entirely vacates the will[e].

3. PERSONS incapable of making teſtaments, on account of their criminal conduct, are in the firſt place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own diſpoſal, but forfeited to the king. Neither can a *felo de ſe* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a deviſe of his lands, for they are not ſubjected to any forfeiture[f]. Outlaws alſo, though it be but for debt, are incapable of making a will, ſo long as the outlawry ſubſiſts, for their goods and chattels are forfeited during that time[g]. As for perſons guilty of other crimes, ſhort of felony, who are by the civil law precluded from making teſtaments, (as uſurers, libellers, and others of a worſe ſtamp) by the common law their teſtaments may be good[h]. And in general the rule is, and has been ſo at leaſt ever ſince Glanvil's time[j], *quod libera ſit cujuſcunque ultima voluntas.*

LET us next, *thirdly*, conſider what this laſt will and teſtament is, which almoſt every one is thus at liberty to make; or, what are the nature and incidents of a teſtament. Teſtaments both Juſtinian[i] and ſir Edward Coke[k] agree to be ſo called, becauſe they are *teſtatio mentis*: an etymon, which ſeems to ſavour too much of the conceit; it being plainly a ſubſtantive derived from the verb *teſtari*, in like manner as *juramentum, incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis noſtrae juſta ſententia de eo, quod quis* "*poſt mortem ſuam fieri velit*[l]:" which may be thus rendered into Engliſh, "the legal declaration of a man's intentions, "which he wills to be performed after his death." It is call-

d Prec. Chan. 44.
e 4 Rep. 60. 2 P. Wms. 624.
f Plowd. 261.
g Fitz. *Abr.* t. *deſcent.* 16.
h Godolph. p. 1. c. 12.
j *l.* 7. *c.* 5.
i *Inſt.* 2. 10.
k 1 Inſt. 111. 322.
l *Ff.* 28. 1. 1.

ed *ſententia* to denote the circumſpection and prudence with which it is ſuppoſed to be made: it is *voluntatis noſtrae ſententia*, becauſe it's efficacy depends on it's declaring the teſtator's intention, whence in England it is emphatically ſtiled his *will*: it is *juſta ſententia*; that is, drawn, atteſted, and publiſhed with all due ſolemnities and forms of law: it is *de eo, quod quis poſt mortem ſuam fieri velit*, becauſe a teſtament is of no force till after the death of the teſtator.

THESE teſtaments are divided into two ſorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the teſtator *in extremis* before a ſufficient number of witneſſes, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a ſupplement to a will; or an addition made by the teſtator, and annexed to, and to be taken as part of, a teſtament: being for it's explanation, or alteration, or to make ſome addition to, or elſe ſome ſubtraction from, the former diſpoſitions of the teſtator [m]. This may alſo be either written or nuncupative.

BUT, as *nuncupative* wills and codicils, (which were formerly more in uſe than at preſent, when the art of writing is become more univerſal) are liable to great impoſitions and may occaſion many perjuries, the ſtatute of frauds, 29 Car. II. c. 3. hath laid them under many reſtrictions; except when made by mariners at ſea, and ſoldiers in actual ſervice. As to all other perſons, it enacts; 1. That no written will ſhall be revoked or altered by a ſubſequent nuncupative one, except the ſame be in the lifetime of the teſtator reduced to writing, and read over to him, and approved; and unleſs the ſame be proved to have been ſo done by the oaths of three witneſſes at the leaſt; who, by ſtatute 4 & 5 Ann. c. 16. muſt be ſuch as are admiſſible upon trials at common law. 2. That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds 30*l*; unleſs proved by three ſuch witneſſes, preſent at the making thereof, (the Roman law requiring ſeven [n]) and unleſs they or ſome of them were ſpe-

[m] Godolph. p. 1. c. 1. §. 3.

[n] *Inſt.* 2. 10. 4.

cially required to bear witnefs thereto by the teftator himfelf; and unlefs it was made in his laft ficknefs, in his own habitation or dwelling-houfe, or where he had been previoufly refident ten days at the leaft, except he be furprized with ficknefs on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will fhall be proved by the witneffes after fix months from the making, unlefs it were put in writing within fix days. Nor fhall it be proved till fourteen days after the death of the teftator, nor till procefs hath firft iffued to call in the widow, or next of kin, to conteft it, if they think proper. Thus hath the legiflature provided againft any frauds in fetting up nuncupative wills, by fo numerous a train of requifites, that the thing itfelf has fallen into difufe; and is hardly ever heard of, but in the only inftance where favour ought to be fhewn to it, when the teftator is furprized by fudden and violent ficknefs. The teftamentary words muft be fpoken with an intent to bequeath, not any loofe idle difcourfe in his illnefs; for he muft require the byftanders to bear witnefs of fuch his intention: the will muft be made at home, or among his family or friends, unlefs by unavoidable accident; to prevent impofitions from ftrangers: it muft be in his *laft* ficknefs; for, if he recovers, he may alter his difpofitions, and has time to make a written will: it muft not be proved at too long a diftance from the teftator's death, left the words fhould efcape the memory of the witneffes; nor yet too haftily and without notice, left the family of the teftator fhould be put to inconvenience, or furprized.

As to *written* wills, they need not any witnefs of their publication. I fpeak not here of devifes of lands, which are quite of a different nature; being conveyances by ftatute, unknown to the feodal or common law, and not under the fame jurifdiction as perfonal teftaments. But a teftament of chattels, written in the teftator's own hand, though it has neither his name nor feal to it, nor witneffes prefent at it's publication, is good; provided fufficient proof can be had that it is his hand-writing [o]. And though written in another

[o] Godolph. p. 1. c. 21. Gilb. Rep. 260.

man's hand, and never ſigned by the teſtator, yet if proved to be according to his inſtructions and approved by him, it hath been held a good teſtament of the perſonal eſtate [p]. Yet it is the ſafer and more prudent way, and leaves leſs in the breaſt of the eccleſiaſtical judge, if it be ſigned or ſealed by the teſtator, and publiſhed in the preſence of witneſſes: which laſt was always required in the time of Bracton [q]; or, rather, he in this reſpect has implicitly copied the rule of the civil law.

No teſtament is of any effect till after the death of the teſtator. "*Nam omne teſtamentum morte conſummatum eſt: et* "*voluntas teſtatoris eſt ambulatoria uſque ad mortem* [r]." And therefore, if there be many teſtaments, the laſt overthrows all the former [s]: but the republication of a former will revokes one of a later date, and eſtabliſhes the firſt again [t].

HENCE it follows, that teſtaments may be avoided three ways: 1. If made by a perſon labouring under any of the incapacities before-mentioned: 2. By making another teſtament of a later date: and, 3. By cancelling or revoking it. For, though I make a laſt will and teſtament irrevocable in the ſtrongeſt words, yet I am at liberty to revoke it: becauſe my own act or words, cannot alter the diſpoſition of law, ſo as to make that irrevocable, which is in it's own nature revocable [u]. For this, ſaith lord Bacon [w], would be for a man to deprive himſelf of that, which of all other things is moſt incident to human condition; and that is, alteration or repentance. It hath alſo been held, that, without an expreſs revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a preſumptive or implied revocation of his former will, which he made in his ſtate of celibacy [x]. The Romans were alſo wont to ſet aſide teſtaments as being *inofficioſa*, deficient in natural duty, if they diſinherited or totally paſſed by (without aſſigning a true and

p Comyns. 452, 3, 4.
q *l.* 2. *c.* 26.
r Co. Litt. 112.
s Litt. §. 168. Perk. 478.
t Perk. 479.
u 8 Rep. 82.
w Elem. c. 19.
x Lord Raym. 441. 1 P. Wms. 204.

ſufficient

ſufficient reaſon [y]) any of the children of the teſtator [z]. But if the child had any legacy, though ever ſo ſmall, it was a proof that the teſtator had not loſt his memory or his reaſon, which otherwiſe the law preſumed; but was then ſuppoſed to have acted thus for ſome ſubſtantial cauſe: and in ſuch caſe no *querela inofficioſi teſtamenti* was allowed. Hence probably has ariſen that groundleſs vulgar error, of the neceſſity of leaving the heir a ſhilling or ſome other expreſs legacy, in order to diſinherit him effectually: whereas the law of England makes no ſuch conſtrained ſuppoſitions of forgetfulneſs or inſanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficioſi*, to ſet aſide ſuch a teſtament.

WE are next to conſider, *fourthly*, what is an executor, and what an adminiſtrator; and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of that his laſt will and teſtament. And all perſons are capable of being executors, that are capable of making wills, and many others beſides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre ſe mere*, may be made executors [a]. But no infant can act as ſuch till the age of ſeventeen years; till which time adminiſtration muſt be granted to ſome other, *durante minore aetate* [b]. In like manner as it may be granted *durante abſentia*, or *pendente lite*; when the executor is out of the realm [c], or when a ſuit is commenced in the eccleſiaſtical court touching the validity of the will [d]. This appointment of an executor is eſſential to the making of a will [e]: and it may be performed either by expreſs words, or ſuch as ſtrongly imply the ſame. But if the teſtator makes an incomplete will, without naming any executors, or if he names incapable perſons, or if the executors named refuſe to act; in any of theſe caſes, the ordinary muſt

y See book I. ch. 16.
z *Inſt.* 2. 18. 1.
a Weſt. Symb. p. 1. §. 635.
b Went. Off. Ex. c. 18.
c 1 Lutw. 342.
d 2 P. Wms. 589, 590.
e Went. c. 1. Plowd. 281.

grant adminiſtration *cum teſtamento annexo*[f] to ſome other perſon; and then the duty of the adminiſtrator, as alſo when he is conſtituted only *durante minore aetate, &c.* of another, is very little different from that of an executor. And this was law ſo early as the reign of Henry II; when Glanvil[g] informs us, that "*teſtamenti executores eſſe debent ii, quos teſtator ad hoc elegerit, et quibus curam ipſe commiſerit: ſi vero teſtator nullos ad hoc nominaverit, poſſunt propinqui et conſanguinei ipſius defuncti ad id faciendum ſe ingerere.*"

BUT if the deceaſed died wholly inteſtate, without making either will or executors, then general letters of adminiſtration muſt be granted by the ordinary to ſuch adminiſtrator as the ſtatutes of Edward the third and Henry the eighth, before-mentioned, direct. In conſequence of which we may obſerve; 1. That the ordinary is compellable to grant adminiſtration of the goods and chattels of the wife, to the huſband, or his repreſentatives[h]: and of the huſband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his diſcretion[i]. 2. That, among the kindred, thoſe are to be preferred that are the neareſt in degree to the inteſtate; but, of perſons in equal degree, the ordinary may take which he pleaſes[k]. 3. That this *nearneſs* or propinquity of degree ſhall be reckoned according to the computation of the civilians[l]; and not of the canoniſts, which the law of England adopts in the deſcent of real eſtates[m]: becauſe in the civil computation the inteſtate himſelf is the *terminus, a quo* the ſeveral degrees are numbered; and not the common anceſtor, according to the rule of the canoniſts. And therefore in the firſt place the children, or (on failure of children) the parents of the deceaſed, are entitled to the adminiſtration: both which are indeed in the firſt degree; but with us[n] the children are allowed the preference[o]. Then follow

f 1 Roll. Abr. 907. Comb. 20.

g *l.* 7. *c.* 6.

h Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.

i Salk. 36. Stra. 532.

k See page 496.

l Prec. Chanc. 593.

m See pag. 203. 207. 224.

n Godolph. p. 2. c. 34. §. 1. 2 Vern. 125.

o In Germany there was a long diſpute whether a man's children ſhould inherit

follow brothers [p], grandfathers [q], uncles or nephews [r], (and the females of each claſs reſpectively) and laſtly couſins. 4. The half blood is admitted to the adminiſtration as well as the whole: for they are of the kindred of the inteſtate, and only excluded from inheritances of land upon feodal reaſons. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood [s]; and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion [t]. 5. If none of the kindred will take out adminiſtration, a creditor may, by cuſtom, do it [u]. 6. If the executor refuſes, or dies inteſtate, the adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin [w]. 7. And, laſtly, the ordinary may, in defect of all theſe, commit adminiſtration (as he might have done [x] before the ſtatute of Edward III) to ſuch diſcreet perſon as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor adminiſtrator; his only buſineſs being to keep the goods in his ſafe cuſtody [y], and to do other acts for the benefit of ſuch as are entitled to the property of the deceaſed [z]. If a baſtard, who has no kindred, being *nullius filius*, or any one elſe that has no kindred, dies inteſtate, and without wife or child, it hath formerly been held [a] that the ordinary might ſeiſe his goods, and diſpoſe of them *in pios uſus*. But the uſual courſe now is for ſome one to procure letters

inherit his effects during the life of their grandfather; which depends (as we ſhall ſee hereafter) on the ſame principles as the granting of adminiſtrations. At laſt it was agreed at the diet of Arenſberg, about the middle of the tenth century, that the point ſhould be decided by combat. Accordingly, an equal number of champions being choſen on both ſides, thoſe of the children obtained the victory; and ſo the law was eſtabliſhed in their favour, that the iſſue of a perſon deceaſed ſhall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hiſt. xxix. 28.)

p Harris *in Nov.* 118. *c.* 2.

q Prec. Chanc. 527. 1 P. Wms. 41.

r Atk. 455.

s 1 Ventr. 425.

t Aleyn. 36. Styl. 74.

u Salk. 38.

w 1 Sid. 281. 1 Ventr. 219.

x Plowd. 278.

y Went. ch. 14.

z 2 Inſt. 398.

a Salk. 37.

patent,

patent, or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown[b].

THE interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A's executor is to all intents and purposes the executor and representative of A himself[c]; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A[d]. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property[e]. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others[f].

b 3 P. Wms. 33.

c Stat. 25 Edw. III. st. 5. c. 5. 1 Leon. 275.

d Bro. *Abr. tit. administrator.* 7.

e Styl. 225.

f 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

HAVING

HAVING thus shewn what is, and who may be, an executor or adminiſtrator, I proceed now, *fifthly* and laſtly, to inquire into ſome few of the principal points of their office and duty. Theſe in general are very much the ſame in both executors and adminiſtrators; excepting, firſt, that the executor is bound to perform a will, which an adminiſtrator is not, unleſs where a teſtament is annexed to his adminiſtration, and then he differs ſtill leſs from an executor: and, ſecondly, that an executor may do many acts before he proves the will [g], but an adminiſtrator may do nothing till letters of adminiſtration are iſſued; for the former derives his power from the will and not from the probate [h], the latter owes his entirely to the appointment of the ordinary. If a ſtranger takes upon him to act as executor, without any juſt authority (as by intermeddling with the goods of the deceaſed [i], and many other tranſactions [k]) he is called in law an executor of his own wrong, *de ſon tort*, and is liable to all the trouble of an executorſhip, without any of the profits or advantages: but merely doing acts of neceſſity or humanity, as locking up the goods, or burying the corps of the deceaſed, will not amount to ſuch an intermeddling, as will charge a man as executor of his own wrong [l]. Such a one cannot bring an action himſelf in right of the deceaſed [m], but actions may be brought againſt him. And, in all actions by creditors, againſt ſuch an officious intruder, he ſhall be named an executor, generally [n]; for the moſt obvious concluſion, which ſtrangers can form from his conduct, is that he hath a will of the deceaſed, wherein he is named executor, but hath not yet taken probate thereof [o]. He is chargeable with the debts of the deceaſed, ſo far as aſſets come to his hands [p]: and, as againſt creditors in general, ſhall be allowed all payments made to any other creditor in the ſame or a ſuperior degree [q];

g Wentw. ch. 3.
h Comyns. 151.
i 5 Rep. 33, 34.
k Wentw. ch. 14. Stat. 43 Eliz. c. 8.
l Dyer. 166.
m Bro. *Abr. t. adminiſtrator.* 8.
n 5 Rep. 31.
o 12 Mod. 471.
p Dyer. 166.
q 1 Chan. Caſ. 33.

himſelf

himself only excepted [r]. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages [s]; unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt [t]. But let us now see what are the power and duty of a rightful executor or administrator.

1. HE must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased [u].

2. THE executor, or the administrator *durante minore aetate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed [w]. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of it's having been proved before him: all which together is usually stiled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10. enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the

r 5 Rep. 30. Moor. 527.
s 12 Mod. 441. 471.
t Wentw. ch. 14.
u Salk. 196. Godolph. p. 2. c. 26. §. 2.
w Godolph. p. 1. c. 20. §. 4.

ordinary,

ordinary, or an adminiſtration granted by him, are the only proper ones: but if the deceaſed had *bona notabilia*, or chattels to the value of a *hundred ſhillings*, in two diſtinct dioceſes or juriſdictions, then the will muſt be proved, or adminiſtration taken out, before the metropolitan of the province, by way of ſpecial prerogative [x]; whence the courts where the validity of ſuch wills is tried, and the offices where they are regiſtered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flouriſhed in the beginning of the fifteenth century, and was official to arch-biſhop Chichele, interprets theſe hundred ſhillings to ſignify *ſolidos legales*; of which he tells us ſeventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes [y] that the hundred ſhillings, which conſtituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0¼*d.* This will account for what is ſaid in our antient books, that *bona notabilia* in the dioceſe of London [z], and indeed every where elſe [a], were of the value of ten pounds by *compoſition*: for, if we purſue the calculations of Lyndewode to their full extent, and conſider that a pound of gold is now almoſt equal in value to an hundred and fifty nobles, we ſhall extend the preſent amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 underſtood this antient rule to be meant of the ſhillings current in the reign of James I, and have therefore directed [b] that *five pounds* ſhall for the future be the ſtandard of *bona notabilia*, ſo as to make the probate fall within the archiepiſcopal prerogative. Which prerogative (properly underſtood) is grounded upon this reaſonable foundation: that, as the biſhops were themſelves originally the adminiſtrators to all inteſtates in their own dioceſe, and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed, other than ſuch as lay within their

x 4 Inſt. 335.

y *Provinc. l. 3. t. 13. c. item. v. centum. &c. ſtatutum. v. laicis.*

z 4 Inſt. 335. Godolph. p. 2. c. 22.

a Plowd. 281.

b can. 92.

own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administring the effects.

3. THE executor or administrator is to make an *inventory* [c] of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. HE is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased [d], and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest [e]; but in case of administrators it is otherwise [f]. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator [g]; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend.

[c] Stat. 21 Hen. VIII. c. 5.
[d] Co. Litt. 209.
[e] Dyer. 23.
[f] 1 Atk. 460.
[g] See page 244.

What-

Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered; for,

5. THE executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty [h]. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen [i], money due upon poors rates [k], for letters to the post-office [l], and some others. Fourthly, debts of record; as judgments (docquetted according to the statute 4 & 5 W. & M. c. 20.) statutes, and recognizances [m]. Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands, by distreining) or upon bonds, covenants, and the like, under seal [n]. Lastly, debts on simple contracts, *viz.* upon notes unsealed, and verbal promises. Among these simple contracts, servants wages are by some [o] with reason preferred to any other: and so stood the antient law, according to Bracton [p] and Fleta [q], who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum.* Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to [r]. But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law [s]. If a

h 1 And. 129.

i Stat. 30 Car. II. c. 3.

k Stat. 17 Geo. II. c. 38.

l Stat. 9 Ann. c. 10.

m 4 Rep. 60. Cro. Car. 363.

n Wentw. ch. 12.

o 1 Roll. Abr. 927.

p *l.* 2. *c.* 26.

q *l.* 2. *c.* 56. §. 10.

r 10 Mod. 496. See vol. III. p. 18.

s 5 Rep. 30.

creditor

creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no [t]; provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary [u]. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt [w].

6. WHEN the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts [x].

A LEGACY is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is stiled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor [y]. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our antient law [z], "*de bonis defuncti primo deducenda sunt ea quae sunt necessitatis* "*et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts;

t Plowd. 184. Salk. 299.
u Salk. 303. 1 Roll. Abr. 921.
w Dyer. 32. 2 Leon. 60.
x 2 Vern. 434. 2 P. Wms. 25.
y Co. Litt. 111. Aleyn. 39.
z *l.* 2. *c.* 26.

but

but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it [a]. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid [b]. And this law is as old as Bracton and Fleta, who tell us [c], "*si plura sint debita, vel plus legatum fuerit, ad quae catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*"

IF the legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to any one; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time; it is a lapsed legacy [d]. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in praesenti*, although it be *solvendum in futuro*: and, if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law [e]; and it's adoption in our courts is not so much owing to it's intrinsic equity, as to it's having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued [f]. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir [g]: for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit,

a 2 Vern. 111.
b *Ibid.* 205.
c Bract. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57. §. 11.
d Dyer. 59. 1 Equ. Cas. abr. 295.
e *Ff.* 35. 1. 1 & 2.
f 1 Equ. Cas. abr. 295.
g 2 P. Wms. 601.

intereſt ſhall be payable thereon from the teſtator's death; but if charged only on the perſonal eſtate, which cannot be immediately got in, it ſhall carry intereſt only from the end of the year after the death of the teſtator [h].

BESIDES theſe formal legacies, contained in a man's will and teſtament, there is alſo permitted another death-bed diſpoſition of property; which is called a donation *cauſa mortis*. And that is, when a perſon in his laſt ſickneſs, apprehending his diſſolution near, delivers or cauſes to be delivered to another the poſſeſſion of any perſonal goods, (under which have been included bonds, and bills drawn by the deceaſed upon his banker) to keep in caſe of his deceaſe. This gift, if the donor dies, needs not the aſſent of his executor: yet it ſhall not prevail againſt creditors; and is accompanied with this implied truſt, that, if the donor lives, the property thereof ſhall revert to himſelf, being only given in contemplation of death, or *mortis cauſa* [i]. This method of donation might have ſubſiſted in a ſtate of nature, being always accompanied with delivery of actual poſſeſſion [k]; and ſo far differs from a teſtamentary diſpoſition: but ſeems to have been handed to us from the civil lawyers [l], who themſelves borrowed it from the Greeks [m].

7. WHEN all the debts and particular legacies are diſcharged, the ſurplus or *reſiduum* muſt be paid to the reſiduary legatee, if any be appointed by the will; and if there be none, it was long a ſettled notion that it devolved to the executor's own uſe, by virtue of his executorſhip [n]. But whatever ground there might have been formerly for this opinion, it ſeems now to be underſtood [o] with this reſtriction; that although where the executor has no legacy at all the *reſiduum* ſhall in general be his own, yet wherever there is ſufficient

h 2 P. Wms. 26, 27.

i Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

k Law of forfeit. 16.

l *Inſt.* 2. 7. 1. *Ff. l.* 39. *t.* 6.

m There is a very complete *donatio mortis cauſa*, in the Odyſſey, b. 17. v. 78. made by Telemachus to his friend Piraeus; and another by Hercules, in the Alceſtes of Euripides, v. 1020.

n Perkins. 525.

o Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559. Lawſon v. Lawſon. *Dom. Proc.* 28 Apr. 1777.

on the face of a will, (by means of a competent legacy or otherwise) to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator: concerning whom indeed there formerly was much debate [p], whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law [q]. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds declaring only, that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10. explained by 29 Car. II. c. 30. it is enacted, that the surplusage of intestates' estates, (except of femes covert, which are left as at common law [r]) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters [s]. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have

p Godolph. p. 2. c. 32.

q 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

r Stat. 29 Car. II. c. 3. §. 25.

s Raym. 496. Lord Raym. 571.

sufficiently spoken [t]. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

IT is obvious to observe, how near a resemblance this statute of distribution bears to our antient English law, *de rationabili parte bonorum*, spoken of at the beginning of this chapter [u]; and which sir Edward Coke [w] himself, though he doubted the generality of it's restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato* [x]: which, and because the act was also penned by an eminent civilian [y], has occasioned a notion that the parliament of England copied it from the Roman praetor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given that no child of the intestate (except his heir at law) on whom he settled in his lifetime any estate in lands, or pecu-

t pag. 504.

u pag. 492.

w 2 Inst. 33. See 1 P. Wms. 8.

x The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (*Ff.* 38. 15. 1. *Nov.* 118. *c.* 1. 2, 3. 127. *c.* 1.)

y Sir Walter Walker. Lord Raym. 574.

niary portion, equal to the diſtributive ſhares of the other children, ſhall have any part of the ſurpluſage with their brothers and ſiſters; but if the eſtates ſo given them, by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall now have ſo much as will make them equal. This juſt and equitable proviſion hath been alſo ſaid to be derived from the *collatio bonorum* of the imperial law[z]: which it certainly reſembles in ſome points, though it differs widely in others. But it may not be amiſs to obſerve, that, with regard to goods and chattels, this is part of the antient cuſtom of London, of the province of York, and of our ſiſter kingdom of Scotland: and, with regard to lands deſcending in coparcenary, that it hath always been, and ſtill is, the common law of England, under the name of *hotchpot*[a].

BEFORE I quit this ſubject, I muſt however acknowlege, that the doctrine and limits of repreſentation, laid down in the ſtatute of diſtribution, ſeem to have been principally borrowed from the civil law: whereby it will ſometimes happen, that perſonal eſtates are divided *per capita*, and ſometimes *per ſtirpes;* whereas the common law knows no other rule of ſucceſſion but that *per ſtirpes* only[b]. They are divided *per capita*, to every man an equal ſhare, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repraeſentationis*, in the right of another perſon. As if the next of kin be the inteſtate's three brothers, A, B, and C; here his effects are divided into three equal portions, and diſtributed *per capita*, one to each: but if one of theſe brothers, A, had been dead leaving three children, and another, B, leaving two; then the diſtribution muſt have been *per ſtirpes; viz.* one third to A's three children, another third to B's two children; and the remaining third to C the ſurviving brother: yet if C had alſo been dead, without iſſue, then A's and B's five children, being all in equal degree to the inteſtate, would take in their own rights *per capita; viz.* each of them one fifth part[c].

[z] *Ff.* 37. 6. 1.
[a] See ch. 12. page 191.
[b] See ch. 14. page 217.
[c] Prec. Chanc. 54.

THE ſtatute of diſtributions expreſsly excepts and reſerves the cuſtoms of the city of London, of the province of York, and of all other places having peculiar cuſtoms of diſtributing inteſtates' effects. So that, though in thoſe places the reſtraint of deviſing is removed by the ſtatutes formerly mentioned[d], their antient cuſtoms remain in full force, with reſpect to the eſtates of inteſtates. I ſhall therefore conclude this chapter, and with it the preſent book, with a few remarks on thoſe cuſtoms.

IN the firſt place we may obſerve, that in the city of London[e], and province of York[f], as well as in the kingdom of Scotland[g], and probably alſo in Wales, (concerning which there is little to be gathered, but from the ſtatute 7 & 8 W. III. c. 38.) the effects of the inteſtate, after payment of his debts, are in general divided according to the antient univerſal doctrine of the *pars rationabilis*. If the deceaſed leaves a widow and children, his ſubſtance (deducting for the widow's her apparel and the furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the adminiſtrator: if only a widow, or only children, they ſhall reſpectively, in either caſe, take one moiety, and the adminiſtrator the other[h]; if neither widow nor child, the adminiſtrator ſhall have the whole[i]. And this portion, or *dead man's* part, the adminiſtrator was wont to apply to his own uſe[k], till the ſtatute 1 Jac. II. c. 17. declared that the ſame ſhould be ſubject to the ſtatute of diſtribution. So that if a man dies worth 1800*l.* perſonal eſtate, leaving a widow and two children, this eſtate ſhall be divided into eighteen parts; whereof the widow ſhall have eight, ſix by the cuſtom and two by the ſtatute; and each of the children five, three by the cuſtom and two by the ſtatute: if he leaves a widow and one child, ſhe ſhall ſtill have eight parts, as before; and the child

d page 493.
e Lord Raym. 1329.
f 2 Burn. eccl. law. 746.
g *Ibid.* 782.
h 1 P. Wms. 341. Salk. 246.
i 2 Show. 175.
k 2 Freem. 85. 1 Vern. 133.

ſhall have ten, ſix by the cuſtom and four by the ſtatute: if he leaves a widow and no child, the widow ſhall have three fourths of the whole, two by the cuſtom and one by the ſtatute; and the remaining fourth ſhall go by the ſtatute to the next of kin. It is alſo to be obſerved, that if the wife be provided for by a jointure before marriage, in bar of her cuſtomary part, it puts her in a ſtate of non-entity, with regard to the cuſtom only [l]; but ſhe ſhall be entitled to her ſhare of the dead man's part under the ſtatute of diſtributions, unleſs barred by ſpecial agreement [m]. And if any of the children are advanced by the father in his lifetime with any ſum of money (not amounting to their full proportionable part) they ſhall bring that portion into hotchpot with the reſt of the brothers and ſiſters, but not with the widow, before they are entitled to any benefit under the cuſtom [n]: but, if they are fully advanced, the cuſtom entitles them to no farther dividend [o].

THUS far in the main the cuſtoms of London and of York agree: but, beſides certain other leſs material variations, there are two principal points in which they conſiderably differ. One is, that in London the ſhare of the children (or orphanage part) is not fully veſted in them till the age of twenty-one, before which they cannot diſpoſe of it by teſtament [p]: and, if they die under that age, whether ſole or married, their ſhare ſhall ſurvive to the other children; but after the age of twenty-one, it is free from any orphanage cuſtom, and in caſe of inteſtacy, ſhall fall under the ſtatute of diſtributions [q]. The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reaſonable part [r]. But, notwithſtanding theſe provincial variations, the cuſtoms appear to be ſubſtantially one and the ſame. And, as a ſimilar policy formerly prevailed in every part of the iſland, we may fairly conclude the whole to be of Britiſh

[l] 2 Vern. 665. 3 P. Wms. 16.
[m] 1 Vern. 15. 2 Chan. Rep. 252.
[n] 2 Freem. 279. 1 Equ. Caſ. abr. 155. 2 P. Wms. 526.
[o] 2 P. Wms. 527.
[p] 2 Vern. 558.
[q] Prec. Chanc. 537.
[r] 2 Burn. 754.

original; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Caesar, who established a colony in Britain to instruct the natives in legal knowlege[s]; inculcated and diffused by Papinian, who presided at York as *praefectus praetorio* under the emperors Severus and Caracalla[t]; and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

[s] Tacit. *Annal. l.* 12. *c.* 32.

[t] Selden *in Fletam. cap.* 4. §. 3.

THE END OF THE SECOND BOOK.

APPENDIX.

N°. I.

Vetus Carta FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: Habendam et Tenendam totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: Reddendo et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: Et ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. In cujus rei testimonium huic presenti carte sigillum meum apposui: Hiis testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, & aliis. Data apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Premises. *Habendum* and *Tenendum*. *Reddendum*. Warranty. Conclusion.

(L. S.)

Memorandum, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin endorsed.

N°. II.

N°. II.

N°. II.

A modern Conveyance by Lease *and* Release.

§. 1. Lease, *or* Bargain *and* Sale, *for a year.*

Premises. This Indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord George the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven,

Parties. between Abraham Barker of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middlesex, esquire, and Francis Golding of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife,

Consideration. in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensealing and delivery of these presents, (the receipt whereof is hereby acknowleged,) and for other good causes and considerations them the said Abraham Barker and Cecilia his wife hereunto specially moving,

Bargain and sale. have bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns,

Parcels. All that the capital messuage, called Dale Hall in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all the singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof:

Habendum. To have and to hold the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before-mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances,

tenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be completed and ended: Yielding and paying therefore unto the said Abraham Barker, and Cecilia his wife, and their heirs and assigns, the yearly rent of one peppercorn at the expiration of the said term, if the same shall be lawfully demanded: To the intent and purpose, that by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs, and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first abovewritten.

N°. II. *Reddendum.* Intent. Conclusion.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

§. 2. *Deed of* RELEASE.

This Indenture of five parts, made the fourth day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven, between Abraham Barker, of Dale Hall in the county of Norfolk, esquire, and Cecilia his wife, of the first part; David Edwards of Lincoln's Inn in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards of Cowbridge in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding of the city of Norwich, clerk, of the second part; Charles Browne of Enstone in the county of Oxford, gentleman, and Richard Moore of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. Whereas a marriage is intended, by the permission of God, to be

Premises. Parties.

N°. II. be shortly had and solemnized between the said John Barker and Katherine Edwards: Now this Indenture witnesseth, that in

Recital. Considera-tion.

consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker, and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents,) by the said David Edwards in hand paid at or before the ensealing and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowlege, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors, and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trusts, as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings of lawful money of Great Britain to the said Abraham Barker and Cecilia his wife in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowleged,) they the said Abraham Barker and

Release.

Cecilia his wife, Have, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their

Parcels.

heirs and assigns, All that the capital messuage called Dale Hall, in the parish of Dale in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dovehouses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof,

or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made to the said Abraham Barker and Cecilia his wife for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession;) and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker, and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: **To have and to hold** the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises herein before mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker, and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all, and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance:

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage:

Then of the husband for life, *sans waste:*

Remainder to trustees to preserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower:

No. II. ance: and from and after the deceaſe of the ſaid Katherine Edwards, or other ſooner determination of the ſaid eſtate, then to the uſe and behoof of the ſaid Charles Browne and Richard More, their executors, adminiſtrators, and aſſigns, for and during, and unto the full end and term of, five hundred years from thence next enſuing and fully to be complete and ended, without impeachment of waſte: upon ſuch truſts nevertheleſs, and to and for ſuch intents and purpoſes, and under and ſubject to ſuch proviſoes and agreements, as are hereinafter mentioned, expreſſed, and declared of and concerning the ſame: and from and after the end, expiration, or other ſooner determination of the ſaid term of five hundred years, and ſubject thereunto, to the uſe and behoof of the firſt ſon of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, and of the heirs of the body of ſuch firſt ſon lawfully iſſuing; and for default of ſuch iſſue, then to the uſe and behoof of the ſecond, third, fourth, fifth, ſixth, ſeventh, eighth, ninth, tenth, and of all and every other the ſon and ſons of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, ſeverally, ſucceſſively, and in remainder, one after another, as they and every of them ſhall be in ſeniority of age and priority of birth, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch ſon and ſons lawfully iſſuing; the elder of ſuch ſons, and the heirs of his body iſſuing, being always to be preferred and to take before the younger of ſuch ſons, and the heirs of his or their body or bodies iſſuing: and for default of ſuch iſſue, then to the uſe and behoof of all and every the daughter and daughters of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) ſhare and ſhare alike, as tenants in common and not as joint-tenants, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch daughter and daughters lawfully iſſuing: and for default of ſuch iſſue, then to the uſe and behoof of the heirs of the body of him the ſaid John Barker lawfully iſſuing: and for default of ſuch heirs, then to the uſe and behoof of the ſaid Cecilia, the wife of the ſaid Abraham Barker, and of her heirs and aſſigns for ever. And as to, for, and concerning the term of five hundred years herein before limited to the ſaid Charles Browne and Richard More, their executors, adminiſtrators and aſſigns, as aforeſaid, it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that the ſame is ſo limited to them upon the truſts, and to and for the intents and purpoſes, and under and ſubject to the proviſoes and agreements, hereinafter mentioned, expreſſed, and declared, of and concerning the ſame: that is to ſay, in caſe there ſhall be an eldeſt or only ſon and one or more other child or children of the ſaid John Barker,

Remainder to other truſtees for a term, upon truſts after mentioned:

Remainder to the firſt and other ſons of the marriage in tail:

Remainder to the daughters, as tenants in common, in tail:

Remainder to the huſband in tail; Remainder to the huſband's mother in fee. The truſt of the term declared;

ker, on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child and children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly. **Provided** always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. **Provided** also, that in case there shall be no such child or children of the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case of the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and

N°. II. to raise portions for younger children, payable at certain times, with maintenance at the rate of 4 *per cent.* and benefit of survivorship. If no such child, or if all die, or if the portions be raised, or paid, or secured by the person next in remainder; the residue of the term to cease.

N°. II.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding. **Provided** also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments and premises; hereby granted and released, and in lieu and recompense thereof unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein before limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever: and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. **And**, for the considerations aforesaid, and for barring all estates tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowlege and levy, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.* with proclamations according to the

Covenant to levy a fine.

the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner levied and acknowleged, or to be levied and acknowleged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker, and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper persons, or by their attorney or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker, and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and

N°. II.

in order to make a tenant to the *praecipe*, that a recovery may be suffered;

No. II.

and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements, herein before-mentioned, expressed, and declared, of and concerning the same. And the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein before-mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; and shall so remain, continue and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker, or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and

to enure

to the preceding uses in this deed.

Other covenants;

for quiet enjoyment,

free from incumbrances;

No. II.

and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker, or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent, or procurement: And moreover that he the said Abraham Barker, and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges, of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements herein before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. *and for further assurance.*

Provided lastly, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby *Power of revocation.*

No. II. before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wise notwithstanding.

Conclusion. In witness whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, being first duly stamped, in the presence of	Abraham Barker. (L. S.)
George Carter.	Cecilia Barker. (L. S.)
William Browne.	David Edwards. (L. S.)
	Francis Golding. (L. S.)
	Charles Browne. (L. S.)
	Richard More. (L. S.)
	John Barker. (L. S.)
	Katherine Edwards. (L. S.)

Nº. III.

An Obligation, *or* Bond, *with* Condition *for the Payment of Money.*

Know all men by these presents, that I David Edwards, of Lincoln's Inn in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale-Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

N°. IV.

A FINE *of Lands* sur Cognizance de Droit, come ceo, *&c.*

§. 1. *Writ of Covenant*; *or* PRAECIPE.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. **Command** Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices, at Westminster, from the day of St. Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Sheriff's return.	Pledges of prosecution.	John Doe. Richard Roe.	Summoners of the within named Abraham, Cecilia, and John.	John Den. Richard Fen.

§. 2. *The Licence to agree.*

Norfolk, to wit. } **David Edwards**, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

§. 3. *The Concord.*

And the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tene-

ments, with the appurtenances, to be the right of him the ſaid David, as thoſe which the ſaid David hath of the gift of the aforeſaid Abraham, Cecilia, and John; and thoſe they have remiſed and quitted claim, from them and their heirs, to the aforeſaid David and his heirs for ever. And further, the ſame Abraham, Cecilia, and John, have granted, for themſelves and their heirs, that they will warrant to the aforeſaid David, and his heirs, the aforeſaid tenements, with the appurtenances, againſt all men for ever. And for this recognition, remiſe, quit-claim, warranty, fine, and agreement, the ſaid David hath given to the ſaid Abraham, Cecilia, and John, two hundred pounds ſterling. N°. IV.

§. 4. *The Note, or Abſtract.*

Norfolk; to wit. } **Between** David Edwards, eſquire, complainant, and Abraham Barker, eſquire, and Cecilia his wife, and John Barker, eſquire, deforciants, of two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was ſummoned between them: to wit, that the ſaid Abraham, Cecilia, and John, have acknowleged the aforeſaid tenements, with the appurtenances, to be the right of him the ſaid David, as thoſe which the ſaid David hath of the gift of the aforeſaid Abraham, Cecilia, and John; and thoſe they have remiſed and quitted claim, from them and their heirs, to the aforeſaid David and his heirs for ever. And further, the ſame Abraham, Cecilia, and John, have granted for themſelves, and their heirs, that they will warrant to the aforeſaid David, and his heirs, the aforeſaid tenements, with the appurtenances, againſt all men for ever. And for this recognition, remiſe, quit-claim, warranty, fine, and agreement, the ſaid David hath given to the ſaid Abraham, Cecilia, and John, two hundred pounds ſterling.

§. 5. *The Foot, Chirograph, or Indentures of the* FINE.

Norfolk, to wit. } **This is the final agreement**, made in the court of the lord the king at Weſtminſter, from the day of ſaint Michael in one month, in the twenty-firſt year of the reign of the lord GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth, before John Willis, Thomas Abney, Thomas Burnet, and Thomas Birch, juſtices, and other faithful ſubjects of the lord the king then there preſent, between David Edwards, eſquire, complainant, and Abraham Barker, eſquire, and Cecilia

N°. IV. cilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowleged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§. 6. *Proclamations, endorsed upon the* FINE, *according to the Statutes.*

The first proclamation was made the sixteenth day of November, in the term of saint Michael, in the twenty-first year of the king withinwritten.

The second proclamation was made the fourth day of February, in the term of saint Hilary, in the twenty-first year of the king withinwritten.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king withinwritten.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king withinwritten.

N°. V.

A common RECOVERY *of Lands with* * *double Voucher.*

§. 1. *Writ of Entry* sur Disseisin *in the* Post; *or* PRAECIPE.

George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. **Command** David Edwards, esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our Justices at Westminster on the octave of saint Martin, to shew wherefore he hath not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution,	John Doe. Richard Roe.	Summoners of the withinnamed David.	John Den. Richard Fen.	Sheriff's return.

§. 2. *Exemplification of the* RECOVERY *Roll.*

George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to all to whom these our present letters shall come, greeting. **Know ye**, that among the pleas of land enrolled at Westminster, before sir John Willes, knight, and his fellows, our justices of the bench, of the term of saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained. **Entry** returnable on the octave of saint Mar- Return.

* Note, that if the recovery be had with single voucher, the parts marked "thus" in §. 2. are omitted.

N°. V.

Demand against the tenant.

tin. **Norfolk**, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past.

Count.

And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [* of six shillings and eight pence, and more, in rents, corn, and grass:] and into which [the said David hath not entry, unless as aforesaid:] and thereupon he bringeth suit, [and good proof.]

Esples.

Defence of the tenant.

And the said David in his proper person comes and defendeth his right, when [and where it shall behove him,] and thereupon voucheth to warranty

Voucher.

"Warranty.

" John Barker, esquire; who is present here in court in his " proper person, and the tenements aforesaid with the appurte- " nances to him freely warranteth, [and prays that the said " Francis may count against him.]

"Demand "against the "vouchee.

And hereupon the said " Francis demandeth against the said John, tenant by his own " warranty, the tenements aforesaid with the appurtenances, in " form aforesaid, &c.

"Count.

And whereupon he saith, that he him- " self was seised of the tenements aforesaid with the appurte- " nances, in his demesne as of fee and right, in time of peace, " in the time of the lord the king that now is, by taking the " profits thereof to the value, &c. And into which, &c. And " thereupon he bringeth suit, &c.

"Defence "of the "vouchee.

And the aforesaid John, te- " nant by his own warranty, defends his right, when, &c. and " thereupon he further voucheth to warranty" Jacob Morland;

"Second "voucher.

Warranty.

who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c.

Demand against the common vouchee.

And hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances in form aforesaid, &c.

Count.

And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c.

Defence of the common vouchee.

And the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth sup-

Plea, *nul disseisin.*

* The clauses, between hooks, are no otherwise expressed in the record than by an &c.

 pose;

pose: and of this he puts himself upon the country. And the aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. Therefore it is considered, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances; and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid;] "and further, that the said John, have of the land of the said" Jacob to the value [of the tenements aforesaid.] And the said Jacob in mercy. And hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. All and singular which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. Witness sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

No. V. Imparlance. Default of the common vouchee. Judgment for the demandant. Recovery in value. Amercement. Award of the writ of seisin, and return. Exemplification continued. *Teste.*

Cooke.

THE END.